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Vol. V.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 339.

TOLEDO SCALE COMPANY, PETITIONER,

vs.

THE COMPUTING SCALE COMPANY.

No. 388.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND AND UNITED STATES FIDELITY AND GUARANTY COMPANY, PETITIONERS,

vs.

THE COMPUTING SCALE COMPANY AND TOLEDO SCALE COMPANY.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONS FOR CERTIORARI FILED MAY 12, 1905.

WRITS OF CERTIORARI AND RETURN FILED AUGUST 4, 1905.

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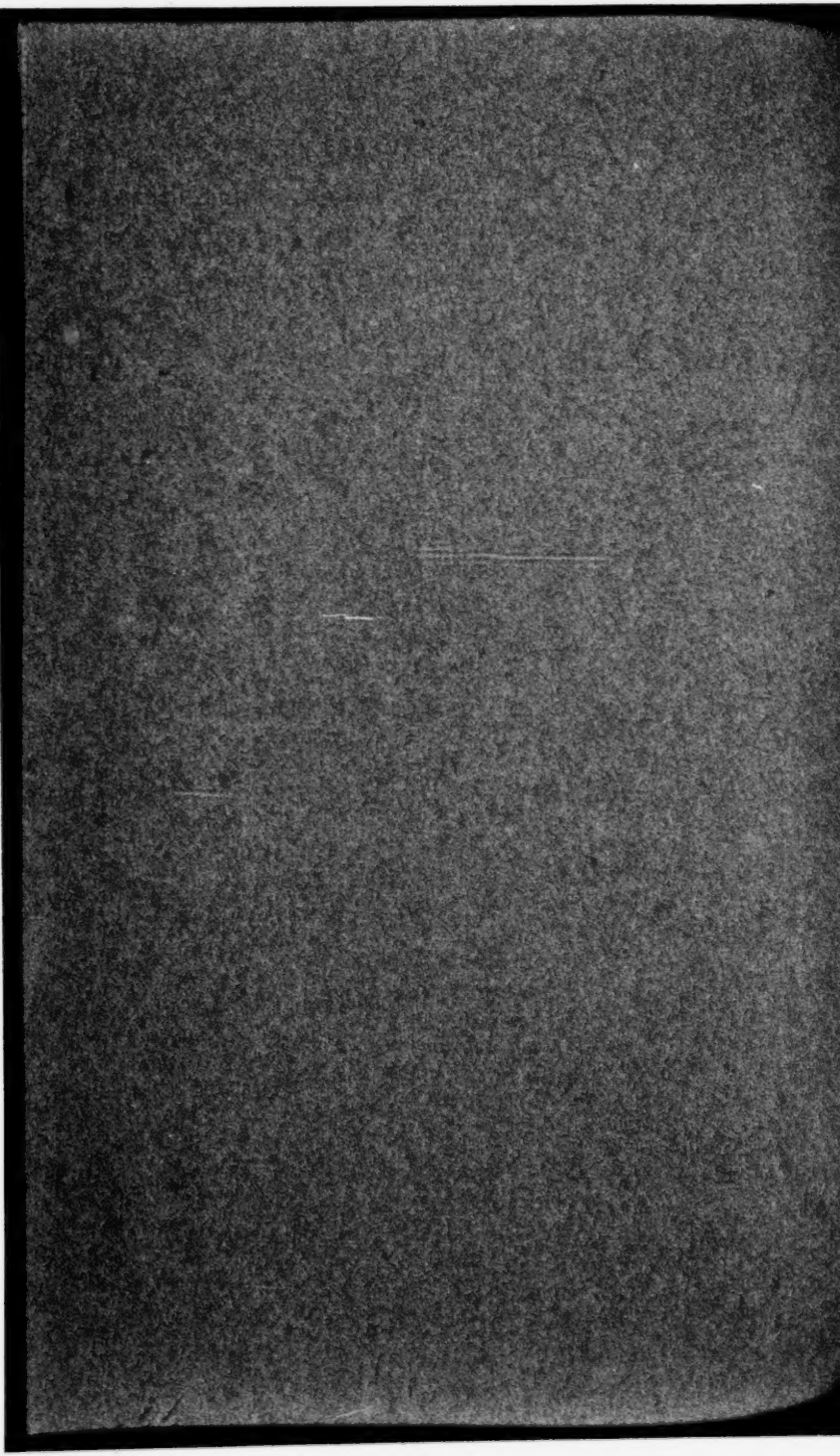

(28,846)

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"1:30 P. *M.* Hearing resumed.

"(ORWELL C. REEVES on witness stand.)

Redirect examination.

By Mr. Meads:

"R. D. Q. 326. Mr. Reeves, have you now with you the original drawing which you made at the time you examined the Phinney scale, which was afterwards marked 'Providence Exhibit 3' at Providence, R. I.?

"A. I have.

"R. D. Q. 327. From that drawing can you give the dimensions of the drum in the Phinney scale as you found them?

"A. The chart spider is 4-11/16 inches in diameter, and each chart is 3-5/16 inches long.

"R. D. Q. 328. Does that appear on the drawing before you?

"A. It appears on the drawing.

"R. D. Q. 329. In answer to question propounded to you by counsel for the complainant this morning you stated that you did not weigh anything on the Phinney scales for the reason that you did not think they would weigh correctly. What was there in the Phinney scale which led you to that belief, if anything?

"A. Well, the scale had been in storage undoubtedly for a long time, although the scale when in use had been sealed by a sealer, the spring would naturally lose much of its value as a means for the offsetting of a load on the platform, the bearings would undoubtedly rust, and there would be verdigris and dirt accumulate in the rack and pinion.

"R. D. Q. 330. Was there anything to indicate to you the age of the scale?

1447 "A. Only by the sealer's seal.

"R. D. Q. 331. How did that indicate anything as to the age of the scale?

"A. The sealer has a seal on the scale marked 'John H. Potter, Town sealer, sealed January 9, 1880.'

"R. D. Q. 332. Did you preserve the record of that on your drawing?

"A. Yes, sir, I did.

"Mr. Meads: We now offer the sketch indentified by the witness to counsel for the complainant for examination and introduction in evidence, if he so desires.

Recross-examination.

By Mr. Zane:

"R. X Q. 333. Now, can you tell me what the length of each of the Phinney cylinders was?

"A. 3-5/16 inches long.

"R. X Q. 334. What was the length of the intervening space between the two cylinders?

"A. 3/8 inches.

"R. X Q. 335. What was the length of the spool?

"A. The length of the spool was 3 1/8 inches.

"R. X Q. 336. Was there more than one spool?

"A. There were two spools.

"R. X Q. 337. Two spools, each 3 1/8 inches in length?

"A. Yes, sir.

"R. X Q. 338. What were the spools in diameter?

"A. The diameter is not marked on this drawing, although it is drawn to a scale.

"R. X Q. 339. Well, what would you say it was?

"A. Yes, here it is, 'diameter wood shaft' 1/2 inch in diameter.

"R. X Q. 340. Now, in this wooden spool was inserted the steel shaft?

"A. Yes, extending through the wooden spools.

"R. X Q. 341. The diameter of the steel shaft was what?

"A. 1/4 inch.

"R. X Q. 342. Then how much wood was there outside of that steel shaft, what thickness of wood?

"A. You mean covering the shaft, the spool?

"R. X Q. 343. Yes, covering the shaft.

"A. I said the spool was 1/2 inch in diameter.

"R. X Q. 344. Well, I wanted to have another correction on that. What is the thickness of weight outside of the steel shaft? 1448

"A. 1/8 inch on each side of the shaft.

"R. X Q. 345. Did the two spools join in the center?

"A. No.

"R. X Q. 346. How far apart were they in the center?

"A. The wooden spools were 9/16 inch apart in the center.

"R. X Q. 347. Did they extend clear to the outside ends of the cylinder?

"A. No.

"R. X Q. 348. How far were they from the outside ends of the cylinder?

"A. 3/32 inch.

"R. X Q. 349. What purpose did the spools fulfil?

"A. They furnished the means of separating the spiders on which the chart was mounted, and also means for retaining those spiders in proper position to the shaft.

"R. X Q. 350. Now was each spider a solid piece of wood?

"A. It had six arms.

"R. X Q. 351. Well, I mean an unbroken piece, was it put together?

"A. An unbroken piece of wood.

"R. X Q. 352. And it consisted of an outside rim, spokes of a wheel, and an inside hub?

"A. Yes.

"R. X Q. 353. Now, the outside rim of the wheel was how wide?
"A. It is not marked on the drawing. It would have to be measured.
"R. X Q. 354. What would be your judgment?
"A. About 17.16 inch.
"R. X Q. 335. The thickness of that outside rim was what?
"A. ⅛ inch.
"R. X Q. 356. Was the spider of uniform thickness through the wheels, rim and hub?
"A. Yes.
"R. X Q. 357. What was the width of each spoke?
"A. The spoke tapered.
"R. X Q. 358. Well, it tapered from the hub out?
"A. Out to the periphery.
"R. X Q. 359. Well, what was its difference in width from hub to periphery?
"A. I imagine at the hub it would measure ⅝ inch, and at the periphery about ½ inch.
1449 "R. X Q. 360. How many spokes?
"A. Six.
"R. X Q. 361. What was the diameter of the hub?
"A. The hub that receives—Well, there is really no hub to that wheel.
"R. X Q. 362. Well, say the spider—what is its diameter, measuring across from spoke to spoke?
"A. I imagine it is about 1¼ inch.
"R. X Q. 363. Now, in both cylinders how many spiders were there?
"A. Four spiders in two cylinders.
"R. X Q. 364. Now, tell me the total length of that steel shaft that run through the center of the spiders as the axis of the cylinders?
"A. It was 7 3/16 inches long.
"R. X Q. 365. Now, between the two cylinders in the center, in that space of 9/16 inch, was there a pinion?
"A. There isn't that much space between the two cylinders. That distance is between the chart spiders. The distance between th cylinders is ⅜ inch; in other words the cylinder overlaps the chart spiders.
"R. X Q. 366. Yes, now in the center there, between the two cylinders there was a pinion, was there?
"A. On the chart shaft between the two cylinders was a pinion.
"R. X Q. 367. How was that pinion mounted on the chart shaft?
"A. It was fastened securely by solder or sweating, brazing.
"R. X Q. 368. Now what was the size of the pinion?
"A. I don't know its diameter. I took no measurements of it.
"R. X Q. 369. You don't know how many teeth were in the periphery of the pinion?
"A. No.
"R. X Q. 370. What was the length of the rack bar?
"A. I don't know.

"R. X Q. 371. And you don't know the size of those teeth?
"A. No.
"R. X Q. 372. As the cylinder revolves, the way it was mounted in the bearings at the end of the axis on the cylinder, it would strike the pinion, wouldn't it, as it revolved?
"A. As the chart would revolve?
1450 "R. X Q. 373. Yes, it would rub against the rack bar, wouldn't it?
"A. The pinion was engaged in the rack bar, yes; pulling on the rack bar would revolve the chart.
"R. X Q. 374. Yes, but would the cylinder, where it came up on either side of the rack bar, at times touch the rack bar?
"A. I made no note of that.
"R. X Q. 375. Did you test that Phinney scale to see how sensitive it was?
"A. I did not.

"WILLIAM L. FLAHERITY, a witness called on behalf of the defendant, being by me first duly cautioned and sworn, testified as follows:

Direct examination.

By Mr. Meads:

"Q. 1. What is your name?
"A. William L. Flaherty.
"Q. 2. Where do you live?
"A. 2616 Scottwood, Toledo, Ohio.
"Q. 3. What is your business?
"A. Purchasing agent for the Toledo Scale Company.
"Q. 4. How long have you been purchasing agent for the Toledo Scale Company?
"A. Eight years.
"Q. 5. What are your duties as the purchasing agent for the Toledo Scale Company?
"A. To buy everything used by the company.
"Q. 6. Were you purchasing agent for the Toledo Scale Company in the year 1911?
"A. I was.
"Q. 7. Did you purchase at that time all the material that was used by the Toledo Scale Company?
"A. I did.
"Q. 8. Were you familiar with the market prices of various metals in that year?
"A. I was.
"Q. 9. Do you know what the market price of aluminum was per pound in the year 1911?
"A. I do.
"Q. 10. What was the market price of aluminum per pound in the year 1911?

1451 "A. The average price we paid for this particular material was 38.6 cents per pound.

"Q. 11. How did the value of aluminum in the year 1911 compare with the value during the year 1912, up to the 31st of August, 1912?

—. It was possibly a little lower; possibly a cent or two lower.

"Q. 12. Which year was possibly a cent or two lower?

"A. 1912.

"13. Did it vary more than two cents per pound?

"A. No, I woudn't think so.

"Q. 14. Do you know the value of aluminum scrap in the year 1911?

"I do.

Mr. Zane: The objection that we made to all this kind of evidence in the examination of the preceding witness we make to this evidence.

"Q. 15. What was the value of aluminum scrap per pound in the year 1911?

"A. The average would be approximately 14½ cents per pound.

"Q. 16. How did that average in 1911 for aluminum scrap compare with the average price in 1912, up to the 1st of September of that year?

"A. It might possibly be a cent or two lower.

"Q. 17. Would it vary more than two cents?

"A. No, I wouldn't think so.

"Q. 18. Did you ever buy any sheet steel for the Toledo Scale Company?

"A. I did.

"Q. Did you buy such sheet steel as was used in the making of chart spiders?

"A. I did.

"Q. 20. Did you buy any such sheet steel in the year 1910?

"A. I did.

"Q. 21. Do you know what the market price for sheet steel of the kind used in the spiders of the Toledo Scale Company was in the year 1910?

"A. I do.

"Q. 22. What was that market price?

"A. Four cents a pound.

"Q. 23. Did you purchase it in the market at that price?

"A. We paid four cents per pound for it.

"Q. 24. How would the price of 4 cents a pound, which was the market price of the commodity in the year 1911, compare
1452 with the price of sheet steel in the years 1910, 1909, 1908, 1907 and the last half of the year 1906?

"Mr. Zane: We object. He has not shown any qualifications to speak for that time.

"A. In going over market reports, on which my answer would be judged, in 1907 I would say that it would be possibly 20 per cent higher; and then on up to 1911 the price was reduced.

"Q. 25. The year 1907 you think the price would be 20 per cent higher?
"A. I would think so. 1907 was a big year in the steel industry.
"Q. 26. And that might be 20 per cent higher?
"A. Yes, sir.
"Q. 27. Would it vary more than 20 per cent?
"A. No, I wouldn't think so.
"Q. 28. Do you know what the market price of steel scrap was in the year 1910?
"A. I do.
"Q. 29. Did you sell any such steel scrap?
"A. Yes.
"Q. 30. What was the market price of such steel scrap?
"A. For this class of material, the average would be approximately 21.8 cents per pound.
"Q. 31. When you bought the aluminum, in what form did you buy it?
"A. Flat sheet. Do you want the size?
"Q. 32. If you know the size.
"A. .017 x 9¼ x 27¾.
"Q. 33. Those are all in inches?
"A. Yes, sir.
"Q. 34. .017, what was that?
"A. An inch.
"Q. 35. What dimension of the sheet?
"A. That was the thickness.
"Q. 36. And the other two are the superficial area?
"A. Yes.
"Q. 37. When you bought the steel, you bought it in sheets of the same kind?
"A. Flat sheets of the same dimension.

"Mr. Zane: The complainant declines to cross examine this witness on the grounds stated in regard to this kind of testimony from the last witness.

1453 "EDWARD J. LINDOW, a witness called on behalf of the defendant, being by me first duly cautioned and sworn, testified as follows:

Direct examination.

By Mr. Meads:

"Q. 1. What is your name?
"A. Edward J. Lindow.
"Q. 2. Where do you live?
"A. 2256 Auburn Avenue, Toledo.
"Q. 3. What is your age?
"A. Forty.
"Q. 4. What is your business?
"A. Manufacture of wood novelties.

"Q. 5. How long have you been engaged in the manufacture of wooden novelties?
"A. Twenty-five years.
"Q. 6. In the city of Toledo?
"A. The city of Toledo, yes, sir.
"Q. 7. Where is your factury?
"A. 2224-2226-2228 Albion Street, Toledo, Ohio.
"Q. 8. Are you familiar with various kinds of wood?
"A. Yes, sir.
"Q. 9. How long have you been familiar with various kinds of wood?
"A. Well, in 1892 I served a regular apprenticeship through the cabinet industry, and as such, of course, grew up familiar with the different kinds of wood that were used for the manufacture of odds and ends and novelties, etc. I have followed it since then continuously from apprenticeship to the position of proprietor.
"Q. 10. You are the proprietor of the establishment now?
"A. I am half proprietor, yes, sir.
"Q. 11. What is the name of the concern?
"A. The Lindow-Leibius Company. Mr. Leibius was a partner, but we bought out his interest and retained the firm name as it had been heretofore, although he is a disinterested member.
"Q. 12. Do you know a wood called Spanish cedar?
"A. Yes, sir.
"Q. 13. Do you know a wood called black walnut?
"A. Yes, sir.
"Q. 14. Which of those woods is the heavier wood?
"A. Walnut.
1454 "Q. 15. I show you a scale which has been offered in evidence in this case as 'Toledo Exhibit No. 1,' and call your attention particularly to the material of which the spoke-like arms in the cylinder—what is the material of which those spokes are composed?
"A. Black walnut.
"Q. 16. Did you ever examine that scale before?
"A. Yes, sir.
"Q. 17. Did you ever make any measurements of the wooden portion of this cylinder?
"A. Yes, sir.
"Q. 18. Where was that done?
"A. At the Toledo Scale Company's plant. That is where I examined the disc, or whatever it is.
"Q. 19. The wooden spider?
"A. The wooden spider, or the disc; I don't know what the technical name of it is.
"Q. 20. When did you make that measurement?
"A. Yesterday, May 1, 1917.
"Q. 21. Do you know from your actual measurement of these wooden spiders, the size of them?
"A. Yes, sir.

"Q. 22. From measurements you yourself made?

"A. From measurements I myself made.

"Q. 23. Will you please state the size of those spiders? What is their outside diameter?

"A. The outside diameter is 8-9/16 inches.

"Q. 24. What is the thickness of the black walnut or the material of which it is made?

"A. Approximately ¼ inch as nearly as the wood working instruments can take the thickness of them.

"Q. 25. What is the width of the outer band, that is, the distance between the outside edge of the spider and the top of the various triangles made by cutting out the wood for the spider; what is the width of that outer band?

"A. The outer band is ⅞ inch in width.

"Q. 26. What is the width of the spokes at the widest portion?

"A. The width of the spokes at the widest portion is ⅞ inch.

"Q. 27. What is the width at the narrowest portion, that is, the portion next to the outer edge?

"A. At the narrowest portion it is ⅝ inch.

"Q. 28. What is the diameter of the circle which would be formed by taking the center of the spider as a center point and de-
1455 scribing a circle which would meet the inside apexes of these triangles?

"A. 2⅛ inches.

"Q. 29. What is the diameter of the perforation or hole in the center?

"A. 5/16 inch.

"Q. 30. Have you made any investigation as to the cost of material and labor involved in the making of such spiders?

"A. Yes, sir.

"Q. 31. Do you know what the cost of black walnut was in the year 1906 per thousand?

"Mr. Zane: We want the same objection to this testimony, a special objection, in addition to the general objection.

"A. I have been buying lumber for twenty years, and as such I am thoroughly conversant with the general run and average price of it for pretty nearly that length of time, and I can refer to invoices.

"Q. 32. Do you know what the cost of it was in 1906 per thousand?

"A. I know it approximately, with a very slight variation because different manufacturers—walnut was not as stable a thing in 1906 as it is today, and job lots were offered once in a while for a little less money than the regular market price.

"Q. 33. Take the market price, not job lots, but the full market price. Do you know what the market price of black walnut was?

"A. Yes, sir, I do.

"Q. 34. What was the price of black walnut per thousand in 1906?

"A. The average price of black walnut of the grade that we purchased was $60 per thousand.

"Q. 35. Is that grade such as is in these spiders?

"A. Such as would be regarded for these.
"Q. 36. Is that in the rough?
"A. Yes, the rough lumber as it comes in the yard from the saw-
ill.
"Q. 37. Now, is that kiln dried?
"A. No, sir.
"Q. 38. Was there any additional cost for kiln drying it?
"A. Yes, sir.
"Q. 39. What is that cost?
"A. The cost per thousand for kiln drying is $4.
"Q. 40. Does the price that you give include cartage?
456 "A. No, sir.
"Q. 41. What was the cartage cost at that time, if you
now?
"A. Well, the cartage from the car, that is, from the railroad
ar to the dry kiln, and from the dry kiln to the factory, as we call it,
hat is, gives us a lay-down price in our factory of $6.00 per thou-
and for cartage.
"Q. 42. What is the freight per thousand, or what was it in 1906?
"A. Approximately $6.00 per thousand on the rough lumber as
t comes from the mill.
"Q. 43. Now, are those all the elements to lay down the lumber
n a rough state in your factory?
"A. Yes, sir, that is, to lay down lumber of a standard thickness
uch as is quoted in all trade journals, lumber is based on the 1 inch
hickness.
"Q. 44. That makes a total of $76.00 per thousand for what
hickness?
"A. That is $76.00 per thousand for 1 inch lumber, or 4/4, as it
s called.
"Q. 45. To obtain lumber ¼ inch in thickness, such as is involved
in these spiders, what would be the next process?
"A. The first operation would be to re-saw it. That would be
to split it through the center.
"Q. 46. How many layers of lumber could you obtain, suitable
for this purpose, from a 1 inch board?
"A. Two thicknesses from a 1 inch board.
"Q. 47. What did re-sawing cost per thousand in 1906?
"A. Approximately $4.00 per thousand.
"Q. 48. What is the next operation to obtain the lumber in its
finished state, after the re-sawing?
"A. The next operation would be to create a perfectly flat piece
of lumber, to joint it and dress it, as we would call it.
"Q. 49. To joint and dress this lumber costs how much a thou-
sand?
"A. About $6.00 a thousand.
"Q. 50. Making a total of $86.00 a thousand for the completed
lumber; is that correct?
"A. Yes, sir, that is ¼ inch lumber, perfectly flat, laid down in
our factory, or in a factory.
"Q. 51. $86.00?

"A. Yes, sir.

"Q. 52. That would give two layers?

1457 "A. Yes, sir.

"Q. 53. Or $43.00 a thousand for each layer?

"A. For a single thickness, yes, sir.

"Q. 54. Now, between the year 1906 and the year 1912 wh variation was there in the lumber market, if you know?

"A. Well, there was a slight upward trend in the market. I a perfectly safe and positive in saying there was about a 10 per ce advance in those six years.

"Q. 55. Do you know how much lumber is required for the man facture of 12 spiders like this?

"A. Yes, sir.

"Q. 56. Have you manufactured 12 such spiders under yo supervision?

"A. Yes, sir.

"Q. 57. Where were they manufactured?

"A. In our factory.

"Q. 58. Under whose supervision?

"A. Under my own personal supervision.

"Q. 59. How much lumber was required for the manufacture 12 spiders?

"A. A 6 feet board measure will make 12 spiders.

"Q. 60. That is——

"A. By board measure, I mean lumber that is 1 inch thick.

"Q. 61. Six feet at $86.00 per thousand, that is.

"A. Yes, sir.

"Q. 62. Or 12 feet at $43.00 per thousand?

"A. Yes, sir.

"Q. 63. Do you know what the cost of six feet of that lumber w in 1906?

"A. Yes, sir.

"Q. 64. What?

"A. $86.00 per thousand laid down in our factory for lumb that is split in half, dressed and jointed on both sides.

"Q. 65. What would 6 feet cost at $86.00 a thousand?

"A. Practically 52 cents.

"Q. 66. It is $51.56?

"A. Yes, 51.6, figuring it to fraction.

"Q. 67. Which cost of 4.3 cents per spider, is it?

"A. Yes, sir.

"Q. 68. Do you know what operations were required to ma those 12 spiders which you have before you?

"A. Yes, sir.

1458 "Q. 69. Those spiders are all the same size as the one that exhibit scale, are they not?

"A. Absolutely, yes, sir.

"Q. 70. What is the first operation?

"A. Squaring and cutting to size after the lumber has been d livered in our mill to the thickness required for making; squari and cutting to size.

"Q. 71. What is the next operation?
"A. Finding the center of the square and describing the outer circle.
"Q. 72. Briefly, tell after you get the square how you find the center; what is the method employed?
"A. The lumber, of course, comes of various widths. The narrowest lumber that we can use for making these must be a little bit larger then the diameter of the finished product should be. The first operation, which consists, as we have the lumber in long boards of random widths and lengths, is to cut it in uniform lengths. Then the second operation is to find the center, which will be the point from which we start to manufacture the finished product.
"Q. 73. Now, you first cut it into squares?
"A. Yes, sir.
"Q. 74. Those are absolute squares?
"A. No they are all of uniform length regardless of the width?
"Q. 75. Well, having obtained the uniform length, what do you do to find the centers?
"A. We strike a point from corner to corner diagonally, which gives us absolutely the center of the piece, no matter whther it is 10 inches or 12 inches or 9 inches wide.
"Q. 76. In other words, the point at which the diagonals of the rectangle intersect is the center?
"A. That is the center, yes, sir.
"Q. 77. Now, after you have obtained the center and described the circles, what is the next operation?
"A. To rough saw that square board into a circle; that is, just to rough saw it.
"Q. 78. What then is the next operation?
"A. The boring of the hole in the center of the piece, which is the point of start for the manufacture.
"Q. 79. The center of the whole piece?
"A. Yes, sir.
"Q. 80. What is the next operation?
"A. The framing of the outer edge in a lathe.
"Q. 81. That is, smoothing it?
1459 "A. Smoothing it. You see we start with that hole in the center. Our boards come of a different width, and we rough saw them first, so as to get them nearly square, because in a good working machine if a square piece were put in the lathe, only the corners would hit, and it would split; so we rough saw them, and we put a pin in this center hole, being the center, and the outer circumference—those are the two points that must be exact in the finished product, and they are turned in a lathe to an absolute accuracy.
"Q. 82. After your turning the outer edge on a lathe, what was your next operation, if any?
"A. The boring of the holes in the six segments that are removed.
"Q. 83. For the purpose of inserting something?
"A. For the purpose of inserting, as we call it, a jig saw, to remove the wood from those open spaces.
"Q. 84. What is the next operation?

"A. The next operation after that?
"Q. 85. After the boring of the hole?
"A. After the boring of the hole is the jig sawing.
"Q. 86. You mean by the jig sawing, the cutting out of those triangular pieces, to form the spokes?
"A. Cutting out the segments, yes, sir.
"Q. 87. After that, what is the next operation?
"A. The hand smoothing or finishing.
"Q. 88. Which is done by what?
"A. By hand. As the discs leave the saw, the saw marks show and they are filed and smoothed by hand.
"Q. 89. And is there any other operation after that?
"A. The last operation is to dip them in oil and allow them to drain.
"Q. 90. How is that done? Just describe it.
"A. By dozens or almost unlimited quantities. They are dipped momentarily into a vat of oil, and allowed to drain off.
"Q. 91. What kind of oil is that?
"A. A grade known to the trade as rubbing oil.
"Q. 92. What is the cost of it a gallon?
"A. About 16 cents.
"Q. 93. How many of those discs would one gallon dip?
"A. A gallon would cover 500 of them.
"Q. 94. Did you keep any track of the amount of time that was involved when you made these 12 discs?
"A. Yes, sir.
1460 "Q. 95. How much time was taken, from the time you started the rough sawing, the beginning, until you finished?
"A. The total amount of time consumed in the manufacture of twelve finished products was 145 minutes.
"Q. 96. Do you know now what you pay for such labor?
"A. Yes, sir.
"Q. 97. How much an hour?

"Mr. Zane: We object at the present time. It is perfectly immaterial.

"A. We are paying today 60 cents an hour.
"Q. 98. Was the price of such labor higher or lower in 1906?
"A. It was less than it is today.
"Q. 99. Was that true of the intermediate years, 1907, 1908, 1909, 1910, 1911 and 1912; in any of those times was it higher than it is today?
"A. No, sir.
"Q. 100. So that 60 cents an hour would at least cover it, and you think more?
"A. Oh, positively.
"Q. 101. Well, that is a cent a minute, is it?
"A. Yes, sir.
"Q. 102. So that the labor involved was 145 cents, is that correct?
"A. $1.45, yes, sir.
"Q. 103. And the cost of the oil would be 12/500 of 16 cents; is that correct?

"A. That is right, yes, sir.
"Q. 104. It is a little over one-third of a cent?
"A. Yes, sir.

"Mr. Zane: There is no cross-examination, for the same reasons as stated before to this class of testimony.

"(It is stipulated by and between the parties that the signatures of the witnesses to the foregoing depositions are waived)."

Rebuttal.

Mr. Zane: Now, if your Honor please, we offer in evidence the Plaintiff's Exhibit 57 for identification. The original was produced and identified and your Honor will recall that the reporter made a copy of it for use. We will offer the original and I suppose you have no objection to the copy as a copy.

1461 Mr. Meads: I don't object on the ground that it is a copy, but I object that it is immaterial and irrelevant. Here is a letter of instructions from a sub-employee, Mr. Bowman, to another sub-employee. I don't see how it is material in this case or how it is competent in this case.

Mr. Zane: If your Honor please, the witness Hanson testified, he testified to going to Toledo and taking certain figures from the books, he testified that in doing so he acted under a letter of instructions, that letter of instructions was produced and we offer that letter of instructions for a double purpose: first, it shows what he was instructed to do, and it shows also that he did not do what he was instructed to do; in the second place it contains an admission by Mr. Bowman over his own signature that certain figures which he had put in evidence are not correct; it is admissible on both grounds. Your Honor will remember that when it was identified I then offered it in evidence and your Honor said that being contradictory in its character, it was not a part of his cross examination, but it remained for us to offer it in our evidence in rebuttal when we came to it. That ruling, of course, we acquiesced in because I think it was right, as that time was not the proper time to introduce it.

The Master: Objection overruled.

(Said letter heretofore marked for identification Plaintiff's Exhibit 57, so offered, received in evidence and marked "Admitted.")

Mr. Zane: We offer in evidence the scale inventory account from page 30 of the Toledo Company's ledger for the year 1911, an account that was identified on the cross examination of Mr. Bowman and as containing various entries in the scale inventory account which began with January 1st, 1911, and closed with December 30th, 1911. It more especially comes into consideration on the U. S. consignment $167,258.26 together with the factory consignment, both entries of January 1st, and the entries with regard to rebuilt and second-hand scales and the entries on November 23rd of U. S. competitors' exchanges and factory competitors' exchanges.

(Scale inventory account from page 30 of the Toledo Scale Company's ledger for the year 1911, so offered, received in evidence, marked Plaintiff's Exhibit 64 and is in the words and figures following:

1462 *Scale Inventory.*

1911.			
Jan. 1.	Bal. from Ledger #7	.....	.....
	U. S. Consignment	.....	167,258.26
	U. S. Factory	.....	18,025.62
	Rebuilt & Sec. Hds	.....	3,896.25
	So. American Consgt's	.....	350.00
	Loaners	.....	2,991.40
Nov. 23.	U. S. Comp. Exchanges, J	.....	20,068.68
Nov. 23.	Factory " " J	.....	3,816.66
Dec. 30.	So. Amer. Increase for yr., J	.....	62.75
Dec. 30.	Ref. U. S. " " " J	.....	2,567.08
			219,036.70

Scale Inventory.

Dec. 30.	Decrease Loaners, J	.....	1,682.48
" "	Cons. U. S., J	.....	38,871.82
" "	Factory U. S., J	.....	6,535.62
" "	Comp. Exch. U. S., J	.....	1,034.03
	Balance to Ledger 9	.....	170,912.75
			219,036.70

Mr. Zane: We next offer in evidence from the catalog of the Toledo Scale Company pages 32, 33, 34, 35, 36 and 37.

Mr. Meads: Objected to, if your Honor please, on behalf of the defendant as no proof of authenticity of the instrument sought to be offered in evidence and for the further reason that the instrument on its face purports to take effect March 15, 1913, which is nearly a year after the close of the accounting period.

Mr. Zane: Well, it has to be taken in connection with the evidence.

The Master: It don't prove itself, Mr. Zane.

Mr. Zane: I understand, but it has been identified. That is the catalog that was put to Mr. Zolg when he was on the stand and also to Mr. Reeves when he was on the stand in regard to the prices for the Toledo scales of different makes, and the testimony is already in the record that that is an authentic catalog of the Toledo Scale Company and also that it shows the prices and the rules as to exchanges that were in force during part at least of the accounting period.

The Master: The evidence does not show—this was not
1463 marked for identification, Mr. Zane—and the evidence itself does not show that this is the document that was shown to these parties and concerning which they testified. Now, I think there should be some proof of that.

r. Zane: It is identified in the record by date, I thought that sufficient.

he Master: Well, if there is sufficient in the record to identify instrument, of course it is shown; I don't remember what the rd is. Is there any question about that?

Ir. Meads: I think there is a severe question about that.

he Master: I mean on the question as to whether or not that is catalog of the Toledo Company. I should admit it as evidence rdless of the fact that it is later than the period because much ur testimony extended before and after, but on the question as vhether or not that is a price list of the Toledo Scale Company t purports to be on its cover——

Discussion.)

The Master: On the statement of counsel for the plaintiff that was one of the documents used by him on his cross examination he witness Reeves I will admit the pages, it appearing on its face ost conclusively that it is the catalog of the Toledo Scale Com-

ıy.

Mr. Meads: To which ruling the defendant excepts, there being proof of the authenticity of the instrument, no attempt to have instrument identified by any witness in this case when oppor-ity for such identification and cross examination was offered, and t the instrument on its face purports to have been issued and blished and to have been effective after the accounting period in estion, and on request counsel for the plaintiff does not indicate the record in this case at any point where the instrument in ques-n is referred to.

Mr. Zane: Your Honor please, I ought to have offered with it the le page and the inside title page and the second printed page in der to show what the pages that we offer are taken from.

The Master: Well, those pages may also be admitted in evidence.

Mr. Meads: And the same objection shown in the record to 64 the ruling of the court in admitting the first parts of the catalog in question is made by the defendant to the ruling the court admitting the pages last offered.

(Said pages from catalog of Toledo Scale Company taking effect arch 15, 1913, so offered, received in nevidence and marked Plain-ff's Exhibit 65, and are in the words and figures following:)

Title page:

"Price List

of

Toledo Scales

for

United States,

Eastern,

No. 16,

Taking Effect March 15, 1913."

Second title page:

"Price List
of
Toledo Scales
for
United States,
Eastern,
No. 16,
Taking Effect March 15, 1913."

Second printed pages:

"*Notice.*

Merchants about to purchase scales frequently write to the factory, thinking thereby to obtain them at lower prices. Under no circumstances will we accept an order at less than the list price; we will not permit salesmen to accept less, and will return all orders at prices less than shown in this price list, less five per cent. discount for cash.

Page 32:

"*Allowances on the Sale of Toledo Non-computers.*

No allowance will be made for any exchange scale in part payment for a Toledo NonComputing Springless Automatic Visible Weigher.

1465 *Allowances for Non-computing Scales.*

No allowance will be made by the Company for non-computing scales in part payment for Toledos. Thee agent may, however, allow out of his commission for non-computing scales in part payment for Toledos only in cases where the order cannot otherwise be secured; but in no case shall the allowance for a non-computing scale exceed $5.00. All such scales become the property of the agent and shall be taken from the purchaser immediately upon the delivery of the Toledo Scale."

Page 33:

"*Allowances for Computing Scales of Other Makes.*

(No allowance for small candy spring computing scales.)

Allowance A, $5.00:

A maximum allowance of $5.00 may be made for one computing scale of other make, in part payment for any Toledo Computing Scale the list price of which is less than $60.00.

Allowance B, $10.00:

A maximum allowance of $10.00 may be made for one computing scale of other make, in part payment for any Toledo Computing Scale the list price of which is not less than $60.00.

Allowance C, $15.00:

A maximum allowance of $15.00 may be made for one computing scale of other make, in part payment for any Toledo Computing Scale the list price of which is not less than $90.00.

Allowance H, $20.00:

A maximum allowance of $20.00 may be made for one computing scale of other make, in part payment for any Toledo Computing Scale, the list price of which is not less than $115.00.

Allowance D, $25.00:

A maximum allowance of $25.00 may be made for one computing scale of other make, in part payment for any Toledo Com-
1466 puting Scale the list price of which is not less than $125.00.

Allowance G, $30.00:

For pendulum computing scale of other make, or for an automatic, platform, barrel-shaped computing scale of other make (either with or without arithmetically correct chart) a maximum allowance of $30.00 may be made in part payment for a Toledo Computing Scale, number 381 or 382, in blue, in which event the scale of other make taken in exchange shall be delivered to and become the sole property of the Company, the same as is the case in all exchanges under allowance A, B, C, D, and E.

Allowance E, $35.00:

For a pendulum computing scale of other make, or for an automatic, platform, barrel-shaped computing scale of other make (either

Page 34:

with or without arithmetically correct chart) a maximum allowance of $35.00 may be made in part payment for a Toledo Computing Scale the list price of which is not less than $160.00, in which event the scale of other make taken in exchange shall be delivered to and become the sole property of the Company, the same as is the case in all exchanges under Allowances A, B, C, and D.

Allowance F, at Option of Salesman:

For a pendulum computing scale of other make, or for a cylinder computing scale of other make with an arithmetically correct chart, the regular maximum allowance C, D or E, plus the salesman's regu-

lar exchange commission (according to the condition and the value for resale of the scale taken in exchange) may be made in part payment for a Toledo Computing Scale, the price of which is not less than $100.00, in which event the salesman shall be given ninety days' time in which to sell the scale taken in exchange. He shall have the privilege to sell said scale received in exchange at any price it may be reasonable to charge for the same, and he shall receive as his commission on such sale the full amount paid by the purchaser less that part of the regular allowance originally borne by the Company. If he fails to sell said scale taken in exchange within
1467 ninety days, the scale shall be delivered to and become the sole property of the Company. A salesman desiring to take advantage of this option shall notify the Company of such desire at the time the order for the Toledo Scale is tendered to the Company for its acceptance.

Allowance for Two or More Computing Scales of Other Makes When Two or More Toledos are Sold.

When more than One computing scale of another make is taken in part payment on the sale of a Toledo System the amount of the allowance for each scale shall be governed by the allowances A, B, C, D and F.

In no case shall the number of computing scales accepted in part payment exceed the number of Toledo Scales sold.

NOTE.—In no case shall an allowance for a computing scale of another make exceed its original selling price.

Page 35: *Allowances for Toledo Scales.*

(These Allowances are Based on Prices Listed on Pages 36 and 37.)

On all Toledo Scales bearing factory number less than 30,000 an allowance of 25% of list price may be made.

On all Toledo Scales bearing factory number from 30,000 to 50,000 inclusive, an allowance of 33 1/3% of list price may be made.

On all Toledo Scales bearing factory number above 50,000 an allowance of 40% of list price may be made.

On all Toledo Cylinder Scales bearing factory number above 60,000, an allowance of 50% of list price may be made, when a 383 or 384 scale is sold.

If the price of the new scale purchased is less than the price of the old Toledo Scale to be taken in exchange, the allowance percentage shall be figured on the price of the new scale, as in every case the allowance percentage shall be figured on the low-priced scale in the transaction.

Any Toledo Scale which has been in use less than one year will be accepted in exchange for a new Toledo Scale of equal or higher price at a valuation equal to the price paid for such an old scale, less a charge of $5.00 per month, with a minimum charge of

1468 $30.00 for the use of the old scale. No commission shall be paid on the amount charged for the use of the old scale.

The regular maximum allowance, figured on the basis of the above percentages and the prices on pages 36 and 37, plus the salesman's regular exchange commission (according to the condition and the value for resale of the scale taken in exchange), may be made for a Toledo Scale in part payment for a new Toledo Computing Scale, the price of which is not less than $100.00, in which event the salesman shall be given ninety days' time in which to sell the scale taken in exchange. He shall have the privilege to sell such scale received in exchange, subject to our regular selling conditions, at any price it may be reasonable to charge for the same, and he shall receive as his commission on such sale the full amount paid by the purchaser, less that part of the regular allowance originally borne by the Company. If he fails to sell said scale taken in exchange within ninety days, the scale shall be delivered to and become the sole property of the Company. A salesman desiring to take advantage of this option shall notify the Company of such desire at the time the order for the new scale is tendered to the Company for its acceptance."

Page 36:

Prices to be Used in Figuring Allowances on Toledo Scales.

(Use Current Price List for Scales not Listed Herein.)

	Blue.	Gold.
1, 2, 3	$40.00	$50.00
9	37.50	42.50
10, 11, 12	60.00	65.00
14, 15, 16, 17, 18, 19, 23, 24, 25	75.00	80.00
20, 21, 22	65.00	75.00
27, 28, 29	65.00	.....
30	80.00	90.00
31	65.00	75.00
32, 33	75.00	85.00
34, 35, 36	80.00	90.00
37, 38, 39	90.00	100.00
40, 41, 42	75.00	85.00
1469 43, 44, 45	90.00	100.00
46	75.00	85.00
50, 51, 52	85.00	95.00
53, 54, 55	100.00	110.00
56	85.00	95.00
57, 58, 59	90.00	100.00
60, 61, 62	45.00	50.00
63, 64, 65	50.00	55.00
66, 67, 68	55.00	66.00
69, 70, 71	50.00	55.00
72, 73, 74	55.00	60.00
75, 76, 77	60.00	70.00
78, 79, 80	65.00	75.00

	Green.
81, 82, 83, 84, 85, 86	$100.00

	Blue.	Gold.	Nickel.
101, 102, 103	$42.50	$47.50	$55.00
104, 105, 106, 107, 108, 109	37.50	42.50	50.00
110, 111, 112	50.00	55.00	.....
113, 114, 115	65.00	70.00	.....
116, 117, 118	70.00	75.00	.....
123, 124, 125	65.00	70.00	.....
131, 132, 133	75.00	85.00	.....
134, 135, 136	65.00	70.00	.....
137, 138, 139	70.00	75.00	.....
143, 144, 145	80.00	85.00	.....
146, 147, 148	75.00	80.00	.....
153, 154, 155	90.00	95.00	.....
156, 157, 158	85.00	90.00	.....

Page 37:	Blue.	Gold.	Green.
163, 164, 165	80.00	90.00	.....
173, 174, 175	90.00	95.00	.....
181, 182, 183, 184, 185, 186, 187, 188.	125.00	135.00	$120.00
210, 211, 212	70.00	75.00	.....
223, 224, 225	85.00	90.00	.....
226, 227, 228	100.00	105.00	.....
243, 244, 245	100.00	105.00	.....
246, 247, 248	115.00	120.00	.....
253, 254, 255	110.00	115.00	.....
256, 257, 258	125.00	130.00	.....
263, 264, 265	105.00	115.00	.....
1470 266, 267, 268	115.00	125.00	.....
273, 274, 275	110.00	115.00	.....
276, 277, 278	125.00	130.00	.....
344	125.00	.....	.....
345, 346, 347, 348, 349, 350	140.00	150.00	.....
353	150.00	165.00	.....
385	120.00	130.00	.....
386	135.00	145.00	.....
387	145.00	155.00	.....
388	160.00	170.00	.....
513, 514, 515	40.00	.....	.....
523, 524, 525	50.00	.....	.....
556, 557, 558	60.00	.....	.....
585	110.00	.....	.....
587	140.00	.....	.....
613, 614, 615	30.00	.....	.....

	Blue.	Gold.
623, 624, 625	$40.00	.....
653, 654, 655	50.00	.....
656, 657, 658	55.00	.....

Mr. Zane: Now, your Honor please, we offer in evidence the United States Letters Patent No. 384,659, granted June 19, 1887, application filed November 6, 1886, granted of the patent: Eugene Wolner, of Liverpool, Lancaster, England; the particular portion of this patent granted in 1887 that we draw attention to is in regard to the drawing and the patent itself showing the dash-pot in combination with other parts of the scale, and the dash-pot is fully shown on the sixth sheet of the patent drawing.

Mr. Meads: To which offer of complainant the defendant objects. This patent has not been referred to or mentioned anywhere in this case at the present time and the offer is not rebuttal testimony. What is it rebutting?

The Master: You contend you have some rights by virtue of subsequent patents in the dash-pot. This I suppose is introduced to show that was all before your rights were obtained, I assume that is the purpose of it.

Mr. Zane: Yes.

Mr. Meads: One thing we claim is that a large part of the salability of the scale is produced by the dash-pot.

The Master: Objection overruled.

1471 (Said patent No. 384,659, so offered, received in evidence and marked Plaintiff's Exhibit 66.)

Mr. Zane: We next offer in evidence Letters Patent of the United States No. 585,979, dated July 6, 1897, issued to Francis H. Richards of Hartford, Connecticut, showing also a dash-pot construction upon the scale, and ask the reporter to mark that Plaintiff's Exhibit 67.

Mr. Meads: To which offer the defendant objects for the same reasons as stated to the offer of Plaintiff's Exhibit 66.

The Master: Objection overruled.

(Said patent No. 585,979, so offered, received in evidence and marked Plaintiff's Exhibit 67.)

Mr. Zane: We next offer in evidence the Letters Patent of the United States to Joseph H. Hopkinson of Dayton, assignor to the Computing Scale Company of Dayton, Ohio, dated April 17, 1906, upon an application filed December 15, 1905, patent No. 817,777, also upon the dash-pot, showing the dash-pot controlling the oscillation of the scale, and ask the reporter to mark this Plaintiff's Exhibit 68.

Mr. Meads: We object to the introduction of the instrument offered as Plaintiff's Exhibit 68 for the reasons given to the introduction of Plaintiff's Exhibits 66 and 67 and for the further reason that the patent in question was issued long after the patent to the defendant offered in evidence in this case on the dash-pot, and on its face would not have been a matter open to the public at the time that the defendant's application for a dash-pot was filed. Application for a patent for a dash-pot was filed, this was filed in 1905 and patent issued in 1906, and the defendant's patent issued in 1889.

Mr. Zane: Their patent was for a combination and this is for a combination.

Mr. Meads: A combination with something else long after our patent was issued.

Mr. Zane: It shows the dash-pot was recognized as old for anybody to use. .

The Master: That may go to the weight of the testimony perhaps. I will admit the patent.

(Said patent No. 817,777, so offered, received in evidence and marked Plaintiff's Exhibit 68.)

Mr. Zane: We next offer in evidence letters patent to John
1472 Greenwood of the City of Manchester for an invention of improvements in self indicating weighing mechanism which is dated July 10, 1877, sealed the 10th of July, 1877, dated the 11th of January, 1877, also containing a dash-pot in combination with other elements. It is the year 1877, No. 148.

Mr. Meads: A British patent, is it not?

Mr. Zane: Yes.

Mr. Meads: You didn't say so, but I supposed it was. Now, will you have it marked for identification?

Mr. Zane: That will be Plaintiff's Exhibit 69.

Mr. Meads: To which offer the defendant objects for the reasons stated in the offers to the last three exhibits and for the further reason that in the offer in question the patent is manifestly one that expired long before the accounting period, and for the further reason that there is no proof in the evidence that knowledge of this British patent has ever been common in the United States.

The Master: Objection overruled.

(Said British patent No. 148, year 1877, so offered, received in evidence and marked Plaintiff's Exhibit 69.)

Mr. Zane: We next offer in evidence British patent to Joseph Cartwright and Wilbraham Cartwright for improvements in self indicating weighing mechanism, the letters patent being numbered 5009 of the year 1888, the date of the acceptance of the patent the 21st of September, 1888, this also showing the construction of a computing scale with the dash-pot used to overcome oscillation and the dash-pot in combination, and we will ask the reporter to mark this Plaintiff's Exhibit 70. I may have said this is a computing scale, this is a self indicating scale, it is so called in the patent. I will ask the reporter to mark this patent, the Cartwright Patent, Exhibit 70.

Mr. Meads: I will ask counsel if he is willing to have the record show now after his further examination of the British patent last mentioned that it is not a computing scale.

Mr. Zane: Well, the patent will speak for itself, it is called in the patent a self indicating scale.

Mr. Meads: Is that offered in evidence?

Mr. Zane: We offer the letters patent.

1473 Mr. Meads: When counsel made the statement in the offer of the exhibit in question I will ask if counsel is willing to

answer what he meant when he said this scale is also a computing scale. If this scale is not a computing scale, to what other scales did he refer?

The Master: Well, the patents themselves are in. They will show whether they are on a computing scale or not. I don't know whether it makes any particular difference if the principle of the dash-pot was in use in other constructions.

Mr. Meads: The defendant objects to the introduction of Plaintiff's Exhibit 70 for the reasons stated in the objection to the introduction of the last offer prior to this.

The Master: Objection overruled.

(Said British patent No. 5009 of the year 1888, so offered, received in evidence and marked Plaintiff's Exhibit 70.)

Mr. Zane: We next offer in evidence letters patent 621,297, dated March 14, 1899, to Allen De Vilbiss, Jr. of Toledo, Ohio, and ask the reporter to mark that Plaintiff's Exhibit 71.

Mr. Meads: As to this patent, if your Honor please, we object on the ground that it is irrelevant and immaterial. Possibly the court may see some relevancy or materiality in it, the mere fact that a patent was issued to somebody does not make it material.

Mr. Zane: Your Honor please, they have offered in evidence Exhibit 39 for certain patent. That patent, Exhibit 39, refers back and incorporates in it a reference to the patent 621,297. You can't understand what their exhibit means until you see this patent.

The Master: Objection overruled.

(Said patent No. 621,297, so offered, received in evidence and marked Plaintiff's Exhibit 71.)

Mr. Zane: We next offer in evidence letters patent of the Untied States No. 649,915, dated May 22, 1900, issued to Allen De Vilbiss, Jr., assignor to the De Vilbiss Computing Scale Company of Toledo, Ohio, and ask the reporter to mark this Plaintiff's Exhibit 72.

Mr. Meads: To the offer of Plaintiff's Exhibit 72 the defendant objects for the reason that the purported patent, 649,915 has been surrendered to the Government and cancelled and no such
1474 patent exists, the subject matter of such patent being now in re-issue No. 12,137 of the United States Government, there is no such thing.

Mr. Zane: This re-issue patent is necessary to show the connection of the defendant, the grantor, with the matter of the dash-pot. This is the original drawing put in and this shows—being intermediate of a certain other patent already in evidence and their re-issue patent—when the idea of putting the dash-pot in their fan chart scale first occurred to them, this shows the history of the thing. They have tried to obscure it by the way they have introduced their patents in evidence.

(Discussion.)

The Master: It might be very true that it is not in force now, but it is a history of the dash-pot so far as the patent office is concerned. A patent might have expired and be no longer in force and yet it might be useful evidence in tracing the art, the process, and the use of the dash-pot. I will overrule the objection.

Mr. Hibben: If the Master please, the other dash-pot patents were put in, as I understand opposing counsel, on another theory, that is, to show the antiquity of the dash-pots. Now, this patent he wants to put in for another reason, and that is apparently he wants to show the date when De Vilbiss originated the dash-pot. Now, he expects to do that by putting in evidence this particular evidence which does not disclose the dash-pot, and then he has a later patent which does disclose that, and then he will assume in between the time of these two patents De Vilbiss originated the dash-pot. Now, outside of that deduction as to whether it is proper or not, we are confronted here with another proposition as to when De Vilbiss originated the dash-pot. I don't think that is proper at all, and if it is submitted on that ground, I suppose they are going to make that point, and if it is material, we will not have an opportunity to introduce evidence to show just when De Vilbiss originated that. It may be he originated it before the time of this patent which is now going in evidence as it is general elementary patent law that all you have got to show in a patent drawing is enough to illustrate the invention being claimed. Now, the man at that time may have a complete machine or other invention which he is going to incorporate with the application or patent then in hand, so that no proper deduction can be drawn from those facts knowing what the general practice is
1475 among inventors and patent solicitors in applying for patents and what the general law on that subject is, so it seems to me this is an entirely new proposition.

The Master: Well, I think I will admit anything that has any bearing or may throw any light on the question of the dash-pot. I will admit this now.

Mr. Meads: If any of these re-issued patents are not in, your Honor will allow them?

The Master: Yes, as at present advised.

(Said letters patent No. 649,915, so offered, received in evidence and marked Plaintiff's Exhibit 72.)

Mr. Zane: Now, I offer Letters Patent of the United States, No. 667,652, dated February 5, 1901, and issued to Allen De Vilbiss, Jr., assignor to the De Vilbiss Computing Scale Company of Toledo, Ohio, and I will ask the reporter to mark that Plaintiff's Exhibit 73, and I will say that the re-issue 12,137 is in the original record in this case.

Mr. Meads: The objection to Exhibit 73 is as stated to the last one, the patent in question has been superseded by the re-issue patent and this patent when surrendered became null and void, and also the same objection which my associate, Mr. Hibben, made to the last offer.

The Master: Objection overruled.

(Said Letters Patent No. 667,652, so offered received in evidence and marked Plaintiff's Exhibit 73.)

Mr. Zane: We next offer in evidence the bill of complaint in the Circuit Court of the United States, Southern District of New York, in the case of the Computing Scale Company and Jonathan B. Hayward, Complainants, vs. Toledo Computing Scale Company, Defendant, in Equity No. 893, and in connection therewith the answer of the Toledo Scale Company and the replication of the complainant and the order of dismissal, and in connection therewith the opinion of the court by Hand, District Judge. I will say now that we have not certified copies. If the counsel for the defendant insists upon having certified copies, we will have to send for them, but at present we will offer this from the printed record with leave to substi-ute certified copies. I may say in offering this record that it bears upon their attempted appropriation of the electric light in a cylinder scale, this shows an action brought by the Computing scale Com-
1476 pany against them in an elder and prior patent for the electric light in a scale, and a trial and finding by the court that there was nothing patentable in the electric light in a scale, and we offer it in connection with the testimony which we will later produce of the fact that the complainant was putting electric lights in its scales long before the time that the defendant claims that it discovered this process of putting an electric light in a scale and putting it behind.

Mr. Meads: Is that all of the offer?

Mr. Zane: Yes.

Mr. Meads: To the offer of the unauthenticated instrument the defendant objects as there is no proof of the authenticity of the instruments in question, and further objects that the instruments offered for the purpose stated by counsel are not evidence of the fact and are incompetent, irrelevant and immaterial and are merely pleadings in the case, self-serving instruments in the case, and for the reason stated by counsel himself, the complainant in such case was defeated in the litigation in which the bill was filed.

Mr. Zane: This is an adjudication between the same parties.

Mr. Meads: Well, it is not anything you have here.

Mr. Zane: Well, counsel knows, here is a printed record.

The Master: I understand they propose to produce certified copies.

Mr. Zane: Yes.

Mr. Meads: I don't understand the offer to produce testimony at another time warrants the introduction of the testimony before it is offered, and I object to it in this form.

The Master: Well, on that question I will rule on the question assuming that this is a correct copy, and later along they may produce the certified copies if that's required of course, they might have to re-offer them, but the question is up now as to the real competency of these pleadings and the court's opinion in that case. On that question I would like to hear you, Mr. Meads: I don't know what these papers contain.

(Here followed discussion.)

The Master: I will admit the testimony subject to the objection, assuming that certified copies will be produced and when
1477 produced they may be marked with appropriate exhibit numbers.

(Said bill, answer, replication, order of dismissal and opinion in the case of Computing Scale Company and Jonathan B. Hayward vs. Toledo Computing Scale Company, so offered, received in evidence and marked Plaintiff's Exhibit 74.)

JOSEPH HOPKINSON, a witness on behalf of plaintiff, testified as follows:

Direct examination.

By Mr. Zane:

"I reside at Dayton, Ohio, and am Superintendent of the Computing Scale Company of Dayton, Ohio, the plaintiff in this case. I have been such Superintendent since the last of 1902, and prior to that I was Assistant Superintendent for three years, and prior to that from November, 1894, I had charge of the experimental and drawing room in connection with the construction and making of new devices.

"Prior to coming with the Computing Scale Company I was draftsman and Assistant Engineer for the Indianapolis Switch & Frog Company. When I came with the Computing Scale Company in November, 1894, I was employed as draftsman and working on the drawings for two or three different kinds of scales for several months; I was then sent to the Final Inspection Department for a period of six or more months; then transferred back to the drawing room and continued in the drawing room and experimental room until 1902. I was made Assistant Superintendent in 1899, and I retained supervision of the experimental and drawing rooms and took over supervision of the construction of the scales in the preliminary stages of their manufacture. Since 1902 I have been General Superintendent and I have had general supervision over the entire manufacturing and also over the experimental work, purchasing, and general conduct of the business of the company.

"During the course of my experience with the Computing Scale Company of Dayton, I know that they have built platform cylinder scales. I originated the idea of making their platform drum
1478 computing scale—the No. 63 made by our company—about May or June 1899. We were at that time making and selling the hanging drum scale, and the agents and salesmen that I came in contact with said that the pan was objectionable in that it swung backward and forwards, and the thought occurred to me, why not put it above a platform. In order to put my idea into shape to test its practicability, I had made a board platform or base, on which was mounted a lever, that is, I supported a lever on this wooden base and connected the ends of the lever — the movable members of the drum scale, and mounted a suitable plat-

form above the lever. I then tested this model and had one of the officers of the company see the scale, and were taken with the idea. I do not remember what the other officers did. I showed it to the officers of the Company. I then gave instructions to the pattern maker, whom we called Billy Smith, to make drawings for a base and proper outline and lever support, and also for a lever and a pair of columns. Smith was under my supervision and made the patterns for a complete scale. When they were made we built the complete model from the castings produced from these wooden patterns. This scale was made up with a base about three inches high, rectangular in form and in the shape of a letter T. On one end of this base was mounted a support, generally called a lever stand, and on the opposite end was mounted two columns which supported the computing drum and members attached to the computing drum. The lever was supported on the lever stand, and mounted above this was a platform with its necessary connections for stabilizing and maintaining the platform horizontal. I took a drum which was at the factory at that time, and which had been purchased, if I remember correctly, from the eastern factory, which we had recently bought out, prior to my making this model. That was a drum of the No. 61 scale. We worked with these scales and after making a second model, we made five or six more scales. I think it was late in 1900 or 1901 that we commenced to make them regularly each week. In 1902, the early part, we were making them in quantities. I went abroad in 1902 and remember that was one of the scales we were making in pretty good numbers. The type number that we gave this first platform cylinder scale was the No. 63. It might
1479 have been called the No. 63 Majestic in the beginning, but it has always been called the No. 63 scale.

"The first model scale, the second model, and quite a number of the first scales manufactured were fitted with the original air dash-pot that came with the drum from the eastern factory. They had an air dash-pot on each side of the drum above the platform and the lower mechanism of the scale. I believe we began using a liquid dash-pot immediately before or during the time I was abroad. I know the liquid dash-pot was on the scale when I came back. I left New York to go abroad on May 28, 1902, and returned in August of the same year, and then the liquid dash pot was on this 63 scale. We had used a liquir dash-pot before that time, I had made up a model scale and a liquid dash-pot was used on that scale, of a different type scale." The reason we substituted the liquid dash-pot for the air dash-pot was that there was a little complaint about the dash-pot getting dusty, and the plunger has to fit rather closely in an open air dash-pot. My experience has taught me that a plunger used in a liquid dash-pot can be smaller, and it dampens the vibrations of the scale more quickly, and prevents dust accumulations.

"The opening on the customer's side was already on the drum scale when we got them, and since that time we have always continued to make every drum scale with an opening on the customer's side. These drums with the openings on the customer's side have been made by us since 1899.

"As to colors made by the Dayton Company, we have a color which is designated "Standard" color, but we have made scales in all colors, various colors, as they have been ordered by the selling agents. We first used on our cylinder scales the wide opening disclosing the value of figures on the chart about the middle of the spring 1906, to the best of my recollection. I fix this date by our ordering lenses and placing a drum in the chart, which necessitated the use of a wide lens.

"We first used on our scales the line on the glass to indicate the balancing point of the scale in the latter half of 1903. We use a bronze wire to indicate the balancing point, and we purchased the first of our bronze wire in the fall of 1906. Before we purchased the bronze wire, we used piano wire, but I could not state
1480 definitely how long we had used this piano wire. To the best of my recollection we never put the line on the wide lens, and we began using the wide lens about the middle of 1906. The kind of scale that we first used the line on the glass was on the No. 63, which was the platform cylinder scale known as the Boston platform drum scale.

"I am acquainted with the two kinds of charts that have been used in the Dayton platform drum scales. The first type of chart, which I will designate as No. 1, is the chart that divides the space of the pound graduate into as many equal spaces as there are cents in the price per pound. That was first used in our No. 131 type of scale, made and sold about the middle of 1906. This No. 131 scale was the scale with a wide opening—about an inch or an inch and a quarter wide. I don't believe there was a wire on that type of scale. We etched a line on the lens previous to using the wire. After we commenced using the wire we continued to etch the reading line on the smaller lenses—the half-inch lens. We continued making the No. 63 platform scale until 1910. We have continuously used the wire stretched behind the glass since we first adopted it on the No. 1 chart, and we have always used the wide opening with that chart. We have used the liquid dash-pot on every platform cylinder scale since we first introduced it.

"The Dayton Company built a scale with an electric light in it for the illumination early in the year 1909, which was the year in which our fire took place. This fire was on October 20th, 1909. I have refreshed my memory on these matters and I remember that the scale was being made before our fire happened. I have referred to our books since. I have notes and memoranda, if I may be allowed to look at them, but I have refreshed my recollection as to those dates.

"We have an arrangement for levelling the scales—a levelling screw—on most of our drum scales, our drum scales being mounted on a swivel so that the scale can be revolved and looked at from different angles, and in this swivel there are four adjustable feet to bring the scale to a horizontal position. These were first placed on what we called our low platform scale, No. 140, about the middle of 1906, and that scale has been built with a swivel ever since. I think we placed a swivel on our scale known as No. 95, which was

made before the 140, about the same time as the No. 131
1481 was brought out. The No. 95 differed from the 131 in the kind of chart used—as I recall it, the 95 chart had the value gures for ounces, and, in addition, showed the printed values for ch cent.

"We began making the electric light scales in the early part of 909, I believe, and have made them ever since, though we have odified them in design.

"I have been acquainted with the Toledo scale such as the one be- re me, marked Complainant's Exhibit Defendant's Scale, for nine r ten years. I believe the first year I saw them was in 1906, in the tter part of the year, after we made our low platform scale. I fix he comparison by that scale.

"If the scale before me, Complainant's Exhibit Defendant's Scale ere cut off just below the cylinder jacket and all below that taken ff, the remaining part of the scale below would be inoperative as a eighing instrument, and I don't know that it would have any value xcept for the scrap that was in it—the iron and brass in it might e sold for remelting purposes, but it would have no weighing or cale value. After taking off the cylinder drum and its enclosing acket down to the lower housing, it might be possible to put a re- olving disk on the top of the lower housing. The disk would have o be pretty large, possibly twice in diameter the length of the drum o admit of the same number of prices and values on the chart and here would have to be considerable change made in the lower mecha- nism of the scale—the lever would have to be slightly changed and the pendulum system moved to one side. With a disk as large as necessary to accommodate the same price figures and values as on this chart, there would be trouble with oscillation and difficulty in getting the dash-pot to properly overcome the oscillation. Such a disk would have to be about twice the length of the cylinder and the prices per pound would show on one side of the disk. Also it would be possible to put on a disk that revolved through only 180 degrees, but this would cut the disk in two and it would be half the capacity of the whole disk. I don't believe the semi-circular re- volving disk would carry the same number of prices. The weight graduations would preferably be put on the outside edge of the disk. The logical place to put the pinion and rack bar by which the disk would be rotated would be in the center of the scale or center
1482 of the disk, and the disk would be mounted in the center of the scale, the rack bar, of course, would have to be in position to engage the pinion in the center of the scale. To accomplish this, the pendulum would have to be moved to one side, as previously stated, for in the present scale the rack bar and the pinion are on the right-hand end of the cylinder, the rack bar passing through the brass tubing on the right, as you face the scale. A slight change in the shape of the lever would also be required, to connect the rib- bon from the cam to the end of the lever. As at present constructed, the lever is in the form of an oval with a projection at the righthand side of the oval, by which projection the lever connects with the rib- bon passing over the cam, which is at one side of the scale. I would

say that it would be necessary to change the shape of the scale lever if a revolving disk is substituted, so that the projection would take a new position to connect the pinion with the pendulum after the pendulum is moved to one side. Also, the larger and the heavier the disk used, the more it would take to move the disk, and it would require a larger dash-pot with closely set dashers. Generally, very large disks on drums are objectionable on account of the difficulty in getting them to stop readily, and the weight necessary to make them larger.

"It might also be possible to substitute a stationary dial with an index hand revolving over the complete circumference of the dial, as suggested by certain of the witnesses, but the revolving indicator upon which the prices per pound would have to be designated, in making a complete revolution would have to be upside down at some points of the dial. The prices per pound would have to be put on the indicator hand. I do not know of any other place that they could be put, and the value indications would have to be put upon the face of the dial. I have never seen a computing scale with a hand revolving over the complete face of a circular disk. With a revolving hand the engagement of the rack and pinion through which the hand is revolved would logically be at the center of the dial.

"If a fan chart were placed above the lower mechanism in the scale before me, such fan, in order to accommodate the scale capacity of twenty or twenty-four pounds, and to indicate values with
1483 the same size figures and spaces as are now used in this drum, would have an arc equal to the circumference of the drum, which I should judge, to be about twenty-five or twenty-six inches. It would be almost like placing a great big dial on there and revolving the indicating hand approximately through one-sixth of a complete circle. The dimensions of such a fan dial would be approximately twenty-five inches over the arc of the reading line, and a radius for the dial of approximately twenty-five inches.

"I am acquainted with the fan dial scales made by the Toledo Company and I know the capacity of a number of their fan scales. They have a pendulum system with a cam and ribbon connected to the end of the lever.

"Q. Tell us how they get their capacity on their dial?

"A. I have seen Toledo fan scales made with a single pendulum and a Toledo fan scale with a mechanism which adds an additional weight to the pendulum which doubles the capacity of the chart. For instance, if the chart capacity is ten pounds with the pendulum, by adding the additional weight, the capacity would become twenty pounds.

"Q. What is the largest Toledo scale in point of capacity that you have seen which has no change in the pendulum?

"A. I think I have seen a parcel post of twenty or twenty-five pounds capacity, but I don't remember seeing a computing fan chart although I would not swear they did not make one. This one that I saw of twenty or twenty-one pounds was a parcel post. The greatest computing scale chart that I have seen of the fan dial variety is

ten pounds. When you double the capacity on the pendulum by adding a weight to the pendulum, the counterbalancing mechanism would be different, since adding another weight on the pendulum would be equivalent to practically twice the original weight, and in order to weigh ten pounds straight the additional weight would have to be taken off, to use the full capacity of the chart. By a radius of twenty-five inches I mean the arc which consists of the outside periphery of the fan dial. The arc of the chart would have to approximate twenty-five inches, or be equal to the circumference of that drum, and that arc would be an arc of a circle and the center of that circle would be from the periphery not less than twenty-five inches.

1484 "The standards of fan dials are an arc of from forty to fifty-five degrees more or less. Our largest fan scale travels through an arc of less than sixty degrees. The Toledo fan scales that I am acquainted with traveling through forty to forty-five degrees. I have never measured one.

"To substitute in this scale before me a fan shaped dial, it would be necessary to change the counterbalancing mechanism slightly by changing the pendulum weight to accommodate the capacity of the fan and some kind of an indicator would have to be attached to the hub of the pivot or some member in connection with the cam. It would not be necessary to use a rack and pinion for a fan scale. The rack and pinion would be removed entirely though it could be made with a rack and pinion. To make it into a fan chart scale with a rack and pinion is not an easy proposition to begin with and the rack and pinion would not be needed in a fan scale and could be easily removed from that scale as it is now. To cut off the drum by cutting this scale just below the cylinder, preserving their rack bar and pinion, their counterbalancing system and lever and the rest of the scale, and place a fan on there with the necessary indicator and without removing any other part of the scale, would not work. The rack bar being connected on the end of the lever would interfere, it would be an unnecessary member there entirely. To make a fan scale and operate it with a rack and pinion would almost be identical with those of the flat dial scales. The logical place to put the chart would be centrally of the main scale, which would necessitate the change of the pendulum system to the left, and changing the projection from the fan scale lever from where it is now to the center of the lever, in order to engage with the pinion in the center of the chart. That presupposes a revolving hand across the fan dial. To revolve the fan dial behind a fixed indicator, I would consider absolutely impractical.

"To put a cone shaped drum on the lower mechanism of the scale before me, with the cone a frustrum six inches at one end and eight and a half at the other, so that the reading face would be at right angles to the center line of the scale, the axis of the cone would have to be set at an angle to the center line through the scale and the face of the teeth of the pinion would also be at an angle

1485 with the center line through the scale, and slight changes would have to be made in the attachment of the rack bar

either at point of connection to the end of the lever or immediately below the rack proper. In effect, it would be very little different than a cylinder. The spacing on the chart would be slightly closer together at the lower prices, assuming lower prices put at the small end of the cone. The whole mounting of the cone would have to be slightly rearranged, would have to be brought forward one-half of the difference between the smaller end and larger end of the cone—the bearing for the smaller end would have to be brought forward. For the castings, from a mechanical standpoint new patterns would have to be made for the drum support. The castings would have to be changed, or new castings made to support the end of the cone. The axis of the frustrum of the cone would then stand at an angle to the perpendicular line through the center of the scale. It might be possible to revolve the cone inside the present shaped jacket but it would be very objectionable. The dial in there being twisted, I doubt very much whether that would be long enough and to read the scale on the other side there would have to be some changes made.

"The cone would be mounted at an oblique angle. Thus, the changes necessary to substitute the cone chart in detail would be to reconstruct the left-hand end casting; the center bearing to support the shaft would be nearer to the periphery on the left hand end than on the right hand end, the bearings to support the shaft of the frustrum of the cone would have to be properly machined at an angle to the general face of the castings, so that they would be at right angles to the cone. I would make new castings, an entirely new pair of castings, if that job was left to me. The same pinion on the present drum could be used and so could the rack, but you would have to change the angle of the pinion to be at a slight angle to the line through the center of the scale. This can be done by making a pinion like the one on the drum or using the one in the drum, the face of the rack would have to be in alignment with the pinion. There would be a slight change in the mounting of the rack and pinion. The face of the rack at the lower end would have to be thrown at a different angle by either substituting new pieces or twisting the pieces, or cutting them in two and patching them together.

As a manufacturing proposition, twisting the pieces, and cut-
1486 ting them and patching them together, is not feasible, so that I would state, as a manufacturing proposition, these parts ought to be made new. If we used a frustrum of a cone chart and kept its axis the same as the axis of the drum before us, a new casing and a new drum head would be necessary, and the inner casting which supports the bearing for the cone would have to be new and smaller on the smaller end, and the part where the casing separates from the main frame, at the left-hand side of the scale, would have to be changed, as this end would become smaller than the enclosing casing by possibly one and a quarter to one and a half inches, so that this support at the left-hand end of the casing would have to be elevated the same distance. If you had the casing smaller at one end than the other, a man standing in front of a scale to read it, would have to move his head slightly to one side, or twist his head, as the

igures would be slightly at an angle. It would not be as nice a read-ng chart as a parallel chart."

Cross-examination.

By Mr. Meads:

"I am 52 years of age. Before I went with the Computing Scale Company at Dayton, Ohio, I was employed by the Indianapolis Switch & Frog Company, who manufactured special railway appli-nces. They did not make scales. I was in their employ about two nd a half years. Before that I worked for Adler & Sullivan in Chicago. They were engineering architects, engaged in putting up arge buildings. I was with them three months. Before that I was – the Buenos Ayres & Great Southern Railway in South America, where I was employed for about two and a half years, in their draw-ing office, drafting station buildings and such buildings as an ordi-nary railroad would require—everything connected with the running of a railroad. Before that I was employed in London and Man-chester, England, where I had served my time as a cabinet maker. I was an articled apprentice to a cabinet maker, and worked a little while after I came out of my time, but the calling didn't appeal to me and I studied mechanical drawing, studying at the schools in the evening under the direction of the City Guild of London, and the South Kensington Technical School. I practiced my vo-1487 cation as a cabinet maker in London for about a year and a half before I went to South America. I began by appren-ticeship as a cabinet maker when I was fifteen and a half years old.

"My training in the matter of scales began with my employment with the Computing Scale Company of Dayton, as before that time I had never been employed by any manufacturer of scales, nor had I ever engaged in the selling of scales. At the Dayton Company I was first a draftsman and worked in the drawing room for five or six months, then was removed to the Inspection Department, where I stayed for two or three months, and from then on I was continu-ously in connection with the drawing and experimental work, re-maining in the drawing office until 1902, when I was made superin-tendent. From that time on I did very little actual drawing.

"Q. In 1902 when you ceased your connection with the company as a draftsman the Computing Scale Company had already acquired what was known as the Boston scale, had they not?

"A. Yes, sir.

"Q. That was acquired while you were a draftsman?

"A. In 1899.

"Q. Yes, some three years before.

"A. Yes."

These Boston, or Smith Scales were hanging scales and had a rear indication. I never saw a liquid dash-pot on any of these hanging scales. I have seen a hanging scale with a liquid dash-pot, but not on a Boston or Smith Scale. The chart capacity was twenty-four

pounds, graduated in ounces, and the values were indicated by figures for each two ounces, that is, the value figures were placed in alignment with each two ounces, while the weighing part of the scale was graduated to single ounces. This was true of all the Boston or Smith Scales as we received them from Boston. We have made hanging scales with different kinds of charts from those that we got from Boston. We commenced changing the charts in 1906, after we put them in our platform drum scale."

"The reading opening in these so-called Boston or Smith hanging scales was about three eighths to five-sixteenth- of an inch wide. Those scales in which we had the wide opening had an opening of about an inch and three eighths—so, as compared with those scales with the wide openings, the Boston scales had openings of
1488 one-third to one-fourth the size.

"After the Boston scales had begun to be manufactured by the Dayton Company, I remember a little arrow placed at the right of the pounds and ounces to indicate the place at which the readings should be made through the reading glass. The first Boston scales that I saw had this form of indication and that was the only indication on those scales. There was no reading line across the glass, nor any wire underneath the glass in these first scales—only the arrow in the center of the reading slot to indicate the pounds and ounces, and the values."

Q. Now, you have testified on your direct examination that the platform cylinder scales made by the Dayton Company were first experimented with by that company in May or June I believe, 1899?

A. Yes, sir, that is correct.

Q. And how do you fix the date of May or June, 1899?

A. We had some trouble in our polishing department, either a lock-out or a strike, I have forgotten which, and my mother-in-law died about that time. I happened to be away getting men and I know that job was going on at that particular time.

Q. You knew the job was going on because you were away, is that the way you fix it?

A. No, sir, because that was part of my work.

Q. Well, I don't quite understand, Mr. Hopkinson, how you fix this time as May or June.

Mr. Zane: Oh, he has stated.

A. That was the time because I found the original drawing three or four years back and that time has been in my mind since then.

Mr. Meads:

Q. Well, other than this original drawing which you say you found three or four years back what else was there that establishes with you that time?

A. The fact that we had our trouble in the factory, the fact that I was at Indianapolis and came home and found my mother-in-law just ready to pass away.

Q. Much as I regret that sad fact, Mr. Hopkinson——

—. ——.

Q. —I will ask you what relation or how that fixes, anything that you had to do with the paper, the death of your mother-in-law.

A. The original drawing that I discovered at my house or original sketch gave the precise date.

1489 Q. The original sketch you discovered three or four years ago you say?

A. Yes, sir.

Q. Well, then, that is what you rely on rather than this loss of your mother-in-law, is it not?

A. No, because these other events happened at the time those sketches were made and the patterns were made.

Q. This sketch that you are talking about was made by you I take it?

A. Yes, sir.

Q. And you discovered this where?

A. At my home.

Q. In Dayton?

A. In Dayton.

Q. And it is from that sketch that you now say you started this work in 1899, is it?

Mr. Zane: We object.

A. No.

Mr. Zane: Go on.

A. I discovered the sketch before the testimony was being taken in a similar suit. My recollection is pretty clear as to that work that was done because it was within a year or two or three years after we moved over from Main Street over to our Fifth Street factory.

Mr. Meads:

Q. When did you move over to your Fifth Street factory?

A. 1896.

Q. Do you know that it was found one year or two years or three years at that time?

A. Well, there was a lot of other work going on at the same time, my mind is pretty clear on the work I actually did myself and it was the time also the superintendent left us, I can go back to several instances.

Q. Did you make the sketches you are talking about at home or in the factory.

A. Made it in the factory.

Q. Where ordinarily are the factory sketches kept, Mr. Hopkinson?

A. Those sketches were kept in my drawer in the experimental room.

Q. Well, which sketches?

A. The sketch that I have just referred to as being the original of the sketch showing the general outline of the No. 63 scale.

1490 Q. And lay in your drawer in the experimental room from 1899 until three years ago?

A. From 1899.

Q. Yes, had it been in your drawer in the experimental room from 1899 until three years ago?

A. No, sir, when we moved from the Fifth Street factory over to the First Street factory I took home some machinery catalogs and later years looking for a map to locate some land which I owned in Canada I was looking through all these old papers and found this sketch in that book a few weeks before testimony was to be taken in a particular scale suit.

Q. And that so far as you know now you think was about 1914.

A. That the testimony was taken?

Q. No, that you found this sketch.

A. No, sir, the sketch was found in 1911 or a few weeks before—the records will show when the sketch was found.

Q. Well, now, from your recollection, we have no records except your testimony, you think you found the sketch in 1914?

A. No, I found the sketch in 1911.

Q. 1911?

A. Yes, sir.

Q. At your home in this machinery book, is that right?

A. Yes, sir.

Q. Have you still got the sketch?

A. I don't think I have.

Q. Do you know where it is?

A. I believe it is in connection with the other suit, I believe it was used, it was used in the evidence, whether it was taken by the attorneys I can't swear for sure, it was offered in evidence.

"My pattern maker, Mr. Billy Smith, is now dead. He made my board platform for the first scales, or at least, it is more than likely that he did. We have two or three pattern makers. I don't recall who made the first brass pattern for this model, or whether the work was sent out of the factory, but I think it would be made in our tool room—our brass pattern work was in connection with our tool in that factory. One of the men who worked in the tool room

1491 at that time was Mr. C. H. Maltby, and he is still employed there. Another one was Mr. William Burket, who, I believe is working for the Davis Sewing Machine Company of Dayton. I do not remember the names of the others working there, but none of those except Maltby are now with us. The first patterns were made of wood and the second of brass. The castings were made from the brass pattern. I do not remember who made the final brass patterns, as the pattern makers that worked in our tool room are no longer with us, and I do not know where they are. The Eureka Foundry Company made the castings for the first model. They are now out of business. There were three Zimmerman brothers who conducted this foundry, and all of them have passed away except Al Zimmerman, who lives in Dayton. The Eureka Foundry made all our castings until 1903. We changed foundries between 1903 and 1909. My confidence that the Eureka Foundry made these castings

is based on the fact that they made all of our castings at that time. I have no special recollection of an order being given for these castings for the platform drum scale. I could not say whether the Eureka Foundry had any special man, or lot of men for our work. They made castings for others. Good foundry practice would mean certain men on certain jobs.

"When we first made this model on the board platform, I took the drum out of a No. 61 scale—that was a Boston hanging scale that had been sent to us from the Smith factory in Saugatuck, Connecticut. A. U. Smith ran the factory. This scale never left the experimental Department.

"After the first castings had been made in the Eureka foundry, the scale never left the Experimental Department, and the first and second batch of scales were made in the Experimental Department. Mr. Charles McCauley worked on that scale. He is now dead and a young fellow named Wetzel worked in that department but I could not state positively that he worked on that scale. I have forgotten his first name, and while I think he is living in the city Dayton he is no longer with our company. I think he is now with some furnace company in Dayton. Another man who worked in this room was Joe Steinbach. He is no longer with us. The last I heard of him he was working in Dayton for the Ohmer Fare
1492 Register Company. After the first assembly of these scales in the Experimental Department, we had a number of *of* scales made from the original patterns. The first lot was five scales, which were shipped away from the factory. I cannot say where they were shipped, or whether they were shipped for sale or test. I only know that they left the factory. There was a little delay after the first five scales were built before we made any more. In the following year we had labor trouble, in 1900, and I would not state positively when the next batch of twenty-five scales were finished. I know they were made before 1902. Mr. Sanderson came to work for us in May of 1903, and those scales were being made regularly at that time. Mr. Sanderson was a scale expert who was then employed with our Company. He had been in the business all his life. Mr. Sanderson passed away in 1911.

"I do not remember that any draftsman assisted me in preparing the detail drawings from which the patterns for this first platform scale was made—only Smith, the patern maker; there were very few patterns to make and could be made from detailed instructions to the pattern maker. To the best of my recollection that is the way those original patterns were made, or drawings, rather. I do not know where there are any such detailed drawings. I do not remember when the first five scales made were shipped out of the factory. I believe it was in the fall of '99 or the early part of 1900, it was about the time of our second difficulty with the labor unions in the factory, which was in the early part of 1900. I formed my recollection that they left the factory, I say that they left the factory because I know that they were removed from the Experimental Department. In 1899 I had supervision of the Experimental Department, and the drafting office, and at this time was made Assistant

Superintendent. This special work on these first platform scales was not all done in the Experimental Department. We didn't have much machinery in the Experimental room. We had one or two little machines and the major part of the work would be done in the machine shop. I don't recall just where I last saw those five early scales of the platform type after being completed. As we had no packing facilities in the Experimental room, they would have
1493 been sent in the regular order of routine business to the Packing and Shipping Department. I could not give you any definite dates or particulars as to when these five scales left the Experimental Depatrment. All that I can state is that these scales left the Experimental Department. We ordinarily do not send scales from the Experimental Department to the Packing Department without orders, unless I personally give instructions to have them shipped. In this particular case I have no recollection of personally giving instructions for the shipping of these five scales, nor have I any recollection of an order for the shipment of any one of these five scales. I think there was a little delay in starting on the next lot of scales and whether we started those in 1900 or 1901, I could not state positively. I know we shipped one or two scales in 1901. I have refreshed my memory and looked up some records and it became continuous early in 1902. Very early in 1902 they were making those scales regularly. These records from which I have refreshed my recollection were not in my own handwriting. It was not hearsay. I saw the books, but the entries in the books were made by somebody else. I cannot state definitely who was our shipping clerk in 1900, 1901 or 1902. One of them is in the army now. I have forgotten his name. I do not recall giving orders as to shipment of any one of the second lot of twenty-five scales. I have no recollection of ever giving an order for the shipment of any platform cylinder scale. Our business in 1902 was continuous in those scales. We had two departments, one across the canal for making dial scales and another upstairs for making these drum scales, and it runs in my mind that we were located upstairs before 1902 in the department in which these drum scales were built, in that room where they had previously been making their standard market scales. This department had been occupied by us since 1896; at that time we moved from Fifth street to First street, and from 1896 on, it had been used for building standard market scales in the regular line of business. We made computing scales of some kind long before 1902.

"On direct examination I said that we had received various complaints about our hanging types of cylinder scales. The objection was that the pan rocked backward and forward, and the drum in that kind of a scale oscillated, which created an oscillation
1494 in the movement of the drum whereby the reading face of the scale moved slightly backward and forward, making the scale rather difficult to read. So long as the drum would keep oscillating the scale would not register at Zero—the drum would be moving continuously, and it would be impossible to read until the scale came to a perfect standstill. I call the dial the inside drum. Before platform cylinder scales were placed on the market, all the

drum scales that I — any recollection of were of the hanging type. I had never seen any others.

— platform scale is certainly a distinct improvement over the hanging scale. For instance, comparing the relative proportion of platform scales now manufactured with the hanging drum scales now manufactured, the hanging drum scales are practically negligible. In my opinion, the platform is a distinct advantage from a selling standpoint, and the newest type of anything generally sells better than the old type. Independently of the age, however, the merits of the platform scale, enabling a fixed registration when the scale is at zero quickly and quick reading, are distinct advantages.

"On the Smith scale and the Boston hanging scales made at our Saugatuck factory, there were air dash-pots. These were merely cylinders in which a piston was actuated as the drum revolved, compressing the air in the cylinders. One of these cylinders was on each side of the drum, and they were open at the bottom. The objections to that form of construction, I believe, were that it sucked dust from the bottom, and the plungers were fitted rather closely, and the particles of dust getting in would tend to cut the material and probably cause an inaccurate weighing scale. If dust or other particles of foreign matter got into those cylinders, it would increase the friction, and the scale would not register correctly. The plunger would have to be taken out and cleaned. If there was neglect of the merchant, you could not attribute it largely to the piston on the cylinder. In these air dash-pots the amount of movement of the piston was commensurate with the amount of revolution of the drum. That is, the further the drum revolved, the further the piston travelled. If, in the use of this scale with the air plunger the merchant was in the habit of using the scale to weigh from three to six pounds nearly all the time, that portion of the dash-pot which
1495 represented the travel of the piston for three or six pounds, weighing would be fairly clean.

'If the scale was fairly accurate as to those particular weighings, it would be a likely condition that dust would accumulate below the ordinary travel of such a piston, so that error would be accentuated when the piston reached the portion of the cylinder where the dust had accumulated. We did not discover that condition but that was considered objectionable, that the tubes collected dust and moisture, and we were making dial scales at that time, many thousands of them, and I believe our exeperience with those dial scales led us to the final change to a liquid dash-pot on our No. 63. We were using a liquid dash-pot on another scale at the time. Discussion about the unsatisfactory working of the air dash-pot was participated in by our General Manager, Mr. Orange O. Ozias, and myself, and probably others, though I don't remember just whom. Mr. Ozias has now passed away. The concensus of opinion between myself and Mr. Ozias was that air dash-pots were unnecessary."

"The distinct advantages of the liquid dash-pot over the air dash-pot, in a cylinder scale, in my opinion are that the oscillation of the drum can be retarded more readily and more promptly, and the

dasher, or piston, can be made with more clearance around the outer edge—less liability to cause friction. The liquid offers a greater resistance. There would ordinarily be no friction—only under normal conditions. Also, I think a liquid dash-pot is more susceptible of adjustment, because the dashers in the liquid dash-pot have, for years past, been made with two disks with port holes or perforations in them, and these holes can be opened or closed for adjustment. These three advantages of the liquid dash-pot are all I think of now. Also, the liquid dash-pot, with the exception of having to be refilled, would require less care than an air dash-pot, to prevent the entrance of dust or foreign material. It is only necessary to leave a small opening for the passage of the piston rod—I would say a clearance of probably one-sixteenth to one-thirty-secondth of an inch around the rod. In the air dash-pot the openings at the bottom extended across the entire cylinder—I think
1496 they were about seven-eighths of an inch in diameter, and there are two of those cylinders, one on each side, inverted, however, so that there was not the same danger of a particle of dust or coffee, etc., staying in. The clearance of the piston rod is about one-sixteenth of an inch."

"The wide opening through which the readings might be made on our cylinder scale was adapted in the year 1906. Up to that time the width of the reading opening that we had been using was, I believe, three-eighths of an inch. The so-called wide opening was an inch or an inch and a quarter in width. The change in the construction of the drum required the wide openings. The drums were changed to show every penny value at the various prices per pound, instead of the value figures being arranged opposite the one or two ounce weight graduations. That is the first year in which I recollect applying that form of a chart to a drum scale. The mechanical features remained the same. I would not say the chart was arranged exactly like the chart in the scale before me, Complainant's Exhibit Defendant's Scale, for our charts were arranged to fit the prices and capacity of the chart which was made at that time, but the system followed in the arrangement of the figures in the chart of the scale before me. Complainant's Exhibit Defendant's Scale, was the same as that of our new chart. Prior to that time the arrangement of figures has been on an entirely different plan. After the wide opening was adopted we divided each pound into as many parts as there are cents in the price per pound. I do not know why we made this change in the value figures of our chart, but at that time there was advertising about our No. 63 scale. There was some agitation but I could not make that statement as to the real reasons leading up to our making the new chart. It was concurrent with the time when there was some agitation over other kinds of charts. I could not tell definitely how many of the Boston or Smith scales I have seen, but certainly several thousands of them, but that is a lot to see of anything. I would say hundreds. They were all hanging scales, and I do not know of any Smith scales manufactured before we took over the making of them to have a reading line

across the glass of the chart. We first put this reading line on the lens on our platform scale in 1903—in our No. 63 type of scale. That was not a hanging scale. The No. 61 type of scale was
1497 the hanging scale and the No. 63 was a platform scale. This line on the lens was an advantage in that it defined a definite place to read the figures or computations. On our later scales—I would not say on the No. 63—we used the wire or the etched line on the lens. After we started with a wire we used either a wire or a line on the lens, depending on the style of scale. Since we started in 1903 we have continuously used either a reading line or a reading wire, and, in my opinion, there is an advantage in this reading line over the method of reading the indications used on the Smith scale, because it designates a definite place to read the values and indications, and does not give the opportunity for misreading the scale unless a man deliberately wishes to misread. I believe it removed some of the criticism of the Smith scale.

"On all our scales the dealer could see the figures on the scales. The figures on the new chart were not placed in the same relative order as they were in the No. 1 chart. The figures on the new Chart were spaced farther apart, not in the same horizontal line, the figures were staggered, the construction of the chart necessitated it."

I could not state whether the wide opening which we adopted in 1906 was an advantage. It was adopted at the suggestion of Mr. Ozias, our General Manager, who gave me instructions to put it on the scale. It is true that in the scale before me, Plaintiff's Exhibit Defendant's Scale, the opening of an inch or more in width allows more light to pass through the lens on to the reading chart than would an opening three-eighths of an inch. This is an advantage. The lens is not more easily inserted, but it would be a better lens. I have considered than an amprovement of the ⅜ lens. Also, the insertion of the lens across such an opening so as to magnify the size of the figures and thus enable them to be more distinctly read is an advantage. The lens could be just as easily inserted in an opening three-eighths of an inch as in the wider, but a better lens could be used in a- opening of an inch and one-eighth, than in an opening of three-eighths of an inch, which in my opinion, is a distinct advantage. However, I would not say a three-eighths inch lens would cast a shadow. I stated on direct examination that since we adopted the wide opening we have used it continuously on cylinder scales, though we do make cylinder scales now with the nar-
1498 row opening for sale abroad. I do not recall making any of them for sale in this country at the present time.

"We first illuminated any of our platform cylinder scales with electric lights in the year of our fire, 1909. The device illuminated the figures on the drum. I do not know positively if our first scales illuminated a reading sign at the top of the scale. We have made two patterns. My recollection is that we would place two lamps on the top of the scale, as well as lamps inside the end of the scale, and place an extended portion above the top of the drum, generally of frosted glass, and inside this frosted glass were two small globes which were wired with an electric switch, and the circuit opened and

closed with the movement of the platform. When the platform was depressed, the contact was made to close the circuit and illuminate the scale, and when the commodity was removed from the platform the switch was opened and the circuit broken. We did not attach this electric device to our No. 63 scale. It was a different scale, a No. 140 or 144.

We had been making the 140 and 144 since 1906. The difference between these scales and the No. 63 was that the chart was longer. The No. 63 had a chart of probably twelve inches, while the other two had charts of thirteen or fourteen inches in length. The lower part of the scales and platforms and springs were all essentially the same in the several types of scales, but they were placed differently. In our No. 140 scale we attached the extension to the top of the drum and placed the lights on the edge of the casing on the inside of the drum. In the first scale we placed the lights inside the casing with little sockets in the end casting in which the lamps were screwed. We had about ten feet of wire connecting the lamps and the switch was located in one end of the casing between the drum and the outer end of the casing. I do not recall at this time just what else would be involved in making an electric scale, but those are the essential pieces. Of course we had screws, platinum points, and a trigger or switch part carried by the rack bar and adapted to close the switch when the scale moved. This was a metal piece which did not contact the switch when the scale was at zero, but
1499 would contact the switch as soon as the cylinder began to revolve, the trigger moving from the switch points and allowing the two points of the switch to come together. In other words, the trigger furnished the interference to keep the two points of the switch apart. We also applied this electric attachment to our No. 146 scale, or rather we gave the number—146—to the No. 140 scale with the electric attachment. It can be applied to any of our scales. To the best of my recollection our electric illumination for these scales was suggested by Mr. Longstreth, one of our local salesmen. He has been with the company off and on a good many years. I do not know where he is, but he is not now with the Company. I cannot state positively to whom he made the suggestions, but I talked personally with Longstreth regarding this electric attachment, and almost immediately after our conversation we tried out the device. In my opinion there are advantages in the electric illumination of these cylinder scales—the main or principal advantage is that the chart can be illuminated, and the lights can be used for illuminating special signs, advertising, etc."

Then testimony as follows:

Q. Do you think the electric illumination of a scale contributes to its salability at all?

Mr. Zane: I think we will object to this. This is not cross-examination, nor has this witness shown himself competent to give opinions about salability.

The Master: This witness is in no way connected with the sales department and says he has nothing whatever to do with it.

Mr. Meads: Yes, but he is manufacturing things, if your Honor please, for the purpose of sale, presumably making them the best fitted for sale.

The Master: I will sustain the objection.

Mr. Meads:

Q. What other advantage than it illuminates the chart can you give?

A. Not any more than I have already stated. It enables special signs to be illuminated or reading matter of some kind.

I cannot state what proportions of our cylinder scales are now electrically illuminated, but I would estimate from ten to thirty per cent. I suggested the manufacture of these electric scales, but it was after the company had been receiving orders for such scales which necessitated the manufacture of the scales. We pur-
1500 chased material, supplies, built up stock, made parts ready for assembling, and, in some cases, put complete scales into stock before we received the orders, and I base the production of what is made in the factory on the orders current and past. Before these orders were received, I had talked with Mr. Ozias and possibly Mr. Ludlow, as to the manufacture of this electric scale—usually when a new scale is made, it is decided between the officers of the company about how many to commence with, whether there will be 25, 50 or a hundred, and from that time on the superintendent of the factory measures the production by the current orders. I have also talked with Mr. Canby, the President of our company about this electric scale, but I could not say whether that was before it was marketed. I cannot recall now just what Mr. Ozias told me when we discussed this electric scale. The first five electric scales we made were shipped out on orders, and from that time on our business in electric scales has grown until it is now between ten and thirty per cent of the entire business.

"As near as I can remember, we first made platform cylinder scales with the levelling screws about the year 1905 or the beginning of 1906. From 1902 to 1905 or '6, I don't remember seeing any of our platform cylinder scales that had levelling screws. We were not using the swivel base in 1902, and I don't remember when the swivel base was adopted, any nearer than 1902 to 1906. We never made any scales with levelling screws without the swivel base. The swivel base is the turn table which enables the scale to be turned at different angles one portion of the swivel is attached to the scale base and the other is below, and contacts with the counter, and there are steel balls between the two, which act in the same relation as the wheels on an ordinary turn table. It can be called a small turn table. We put the levelling screws in the lower part of the swivel base. The first swivel base we made had screws which were primarily for raising the scale off the counter so that in turning the scale the lower edge of the base would not drag on the counter. The first swivel had screws in there but I would not state that these first screws were levelling devices. They served two purposes. They

could be made adjustable and they would raise the base above the counter. The real object of putting those pieces there—I
1501 would not state that it was for adjusting the scale. Some time later we adopted levelling screws ostensibly for the purpose of levelling the scale. I do not remember just when. We have adjustable screws in there now which have at their upper end a slot in which a screw driver can be placed for turning them. I cannot give the exact date of the adoption of these, but since 1905 or 1906. I don't remember whether the first swivels had that form of screw. In my opinion, there is an advantage in having levelling screws on a scale, for a great many counters are uneven, and by raising or lowering whichever screw is necessary, we secure a firm and stable foundation for the scale. That is one advantage, and, in addition, it enables you to adjust a scale to a horizontal position. This is an advantage because all our scales are assembled and adjusted on a perfectly horizontal plate in the factory, and for good and proper working the scales should be substantially the same position on the merchant's counter. The levelling screws enable you to more approximately obtain this horizontal position.

"We have been equipping some of our scales with spirit levels since 1902 or 1903, to the best of my recollection, but the use of them on our platform cylinder type of scales has been only for probably the last three years. The use of them is to enable the merchant to bring his scale to the same position as it was in when it was originally sealed, and adjusted in our factory. I do not think it would make any difference to the merchant whether the scale had a spirit level or not, so long as his scale weighed and passed inspection. But the scale is more liable to weigh well and pass inspection if it is level. The spirit level is placed on the base of our platform cylinder scales in plain view of the dealer. I believe it would be much easier for the dealer to determine when this scale is level if it has a spirit level on it, and I presume the spirit level was put there for that purpose. The scales on which we put the spirit levels in 1902 or '3, were our No. 73 scale, which was a pendulum scale. We afterwards quit making these scales in 1910, 1911 or 1912. This scale that we used the spirit level on was a fan scale. I do not recall seeing Toledo fan scale prior to 1902. I recall seeing a fan scale with a swinging pan, but whether it was made by the Toledo Company or by De Vilbiss, I do not recall. It was similar to one — were making.
1502 After our fire in 1909 we changed more or less of our scales. We had to make new tools and some new patterns, it necessitated new construction. We changed the position of the lamps in our electric scales."

"When I first saw the Toledo platform cylinder scales I do not remember, nor do I remember where I saw them. I have seen a good many of them, but I cannot remember where I saw the first Toledo scale. We were beginning to make our new scales in the middle of 1906, and my thought- at that time were in connection with the Toledo Company's putting a scale on the market, probably more than seeing it: I don't recall just when I saw the scale. I be-

I was told that the Toledo Company were putting out a drum about that time.

have talked over this case with Mr. Zane, since I have testified That was a week or so ago in the Harris Building, a week ago Monday or Tuesday, and then again this last Monday. At e interviews Mr. Zane and Mr. Morse were present, as was Mr. low, the General Sales Manager and President of the Money-ght Scale Co. He was in court here yesterday. I do not remem-that the information was given me that the Toledo Scale Com-y began selling cylinder scales in 1906. It might have been tioned. I do not think that it was at all. I do not remember I told either of them when I first saw a Toledo cylinder. The wledge that the Toledo Scale Company were putting a scale on market in 1906 came to me about the time we were making our 140 or 144 scale. To the best of my recollection it was general wledge that the Toledo Company were putting out a drum or e going to put out a drum about that time. I do not recall just o told me, but probably it was Ozias.

When I stated in my direct examination that if this scale before was cut off at the point where the drum is supported on the chanism below, it would have no scale value, that statement is dicated on the supposition that it was cut off and left in that con-ion. Everything below the point where I have indicated that the le was to be cut off would have value as an actuating mechanism anything that could be suitably attached to it. What I meant s that if somebody cut this scale right off here, and stopped, it would have no scale value.

03 "To remove this cylinder and in place thereof substitute a disk which would show weight and value figures, a suitable acket would be all that would have to be attached to this lower part the scale before me to hold the disk in position. That bracket uld be screwed on the metal frame of the scale to hold such disk. o actuate the pinion which would be at the rear of the indicating and moving over such disk, it would be necessary to connect such nion by a rack bar with the scale lever. The rack bar in the scale efore me, Plaintiff's Exhibit Defendant's Scale, would be of about ne same length as such rack bar needed to actuate such a pinion. o support the movable indicator in front of the disk a lug or casting ould have to be attached to the pendulum member, and the indi-ator hand would be fastened to that member. I have seen many cales of the general type of a circular disk or a dial with a movable and revolving around them. If the rack and pinion on such a cale were placed in line with the rear end of the scale lever and con-ection of the scale before me, the rack of such scale would travel ver such pinion merely by depressing the platform of the scale efore me, Complainant's Exhibit, Defendant's Scale. If the center f the chart were in line with the rack and pinion, whether you would have to move its plane if the pinion was in the center of the drum, depends upon the structure. It would be — difficult proposi-tion to put that chart there. There would have to be a number of

changes made. I would not consider the thing practical to put a big dial on there.

"(The last sentence was stricken out on motion of the Defendant.)"

"As near as I can recall now, the largest dial on a computing scale I have seen was about 13 inches computing. On automatic scales that are not computing, I have seen them of twenty-four inches in diameter, and that was a fixed dial, with an indicator hand travelling about, actuated by the movement of the platform, suitably connected, a pound and ounce weighing dial. The largest automatic scale I have seen had a dial twenty-four inches in diameter and stationary, with a revolving hand. The amount of the printing either upon the face of the disc or on the revolving hand does not affect the amount of friction involved in the scale, so that this automatic scale with a disc of twenty-four inches in diameter would have more friction than a computing disc of exactly the same size. In that scale the prices were on the revolving hand. The indicating hand would be approximately twelve inches in length, and there is no mechanical difficulty in making an indicator hand twelve inches long of aluminum, or any other light metal. As to that there would be no mechanical difficulty. That scale I testified I had seen, a computing scale with a revolving hand about a fixed disk was, I believe, called the Chicago Scale. As I now remember, the top of the dial was about even with the top of the weighing platform about twelve inches from the counter, the platform being at the right, and the dial being at the left. I first saw it in 1910, at our factory. I do not know when it was manufactured. I do not remember having seen more than one of these scales.

1504

"I do not recall having seen any type of the Chicago scale in which there is a revolving dial operated behind a fixed indicator, nor have I seen any platform scale in which the dial revolved behind a fixed indicator. I have seen this revolving dial in hanging scales. The Computing Scale Company of Dayton made a computing dial scale with the dial revolving past a stationary indicator, from 1896 to 1899, as near as I can remember now. I don't recall any more at this time. I have heard of the Richmond Scale, but the one I have in mind is not an automatic scale. It is a lever scale of peculiar shape. I do not recall ever having seen a Richmond Scale in which the dial revolved about an axis behind a fixed indicator. A dial 26 inches in diameter would have a total area equal to, I would judge, a surface equal to 22 inches square. That would be about 484 square inches. Assuming that the drum in the scale before me is 8 inches in diameter and about 14 inches long, the area of the paper covering would be equal to approximately 375 square inches, so that the dial 26 inches in diameter would contain more surface than the surface covering this drum, though to answer that question properly I would have to secure the circumference of the dial, not approximate it. I could not give the weight of a dial 26 inches in diameter made of tin or aluminum or other light material, but it would be less than a pound. Whether its weight, mounted on suitable bearings, would present enough friction to interfere with the operation of the scale,

I could not say without trying it out." By examining this
1505 spider in the Complainant's Exhibit Defendant's Scale, before me, I could tell the court what material it is made of."

"(Witness here examined scale and tested spider with knife. I find it is of steel. I do not know the weight of that drum, but I would estimate it would be about twelve ounces—ten to twelve ounces.")

"Then testimony as follows:

Q. Then such a dial as you have described would still be in ounces, the weights of the two, the drum and the dial that you have described at the most could not weigh more than six ounces, could they?

A. I would not say definitely what that sheet of aluminum would weigh.

Q. You said it would be in ounces?

A. Yes, inside of sixteen.

Q. And of this ten; then the greatest variation would be six ounces?

A. Yes.

Q. In your opinion as an expert would the difference of six ounces equally distributed from the center opening of such device make any difference in the amount of friction?

A. It certainly would.

Q. How?

A. By difference in added weight.

Q. How does the weight increase the friction?

A. I beg your pardon, I misunderstood your question.

(Question read.)

A. The additional weight of the dial or of the dial on the bearings of the scale?

Q. If those bearings were good roller bearings or were bearings of any approved form of bearings or disc bearings, would the amount of such friction render the scale inoperative?

A. It would depend on how much error was due to the additional weight resulting in the increased friction.

Q. Naturally, but would this amount of added friction upon well constructed bearings render the scale inoperative in your opinion as an expert?

A. In my opinion it would.

Q. In your opinion it would?

A. Yes, sir.

Q. Does not the question of this disposition of friction depend more upon the character of the bearings than it does upon the
1506 additional six ounces in the dial?

A. The bearings have everything to do with the principle of moving the dial.

Q. The bearings have everything to do. If the bearings are practically frictionless and hard material, that's a most important condition, is it not, Mr. Hopkinson?

A. The bearings themselves would be inanimate without a load applied to them.

Q. Yes, but with a load applied to them the bearings, as you say, have everything to do with them?

A. Yes.

Q. Were you familiar with the—well, you have said you were—just tell the court what sort of bearings were in the original hanging 61 scale, Boston scale.

A. What is known as plain journal bearings.

Q. Plain journal bearings, just tell the court what those were. Possibly he does not know what you mean by plain journal bearings. I don't know myself.

A. The spindle of the drum was made of about 3/16ths inch diameter steel with the ends turned down to as near as I can recollect 1/10th of a ninch.

Q. Ends turned to 1/10th of an inch, go ahead.

A. And the bearings were made of bronze I believe.

Q. Well, this small or sharpened end of the shaft——

A. In this piece of bronze holes were drilled and reamed to the same size or slightly over the same size of the diameter of the end of the spindle.

Q. So that the spindle operated directly in these holes, is not that it, in the bottom?

A. Yes.

Q. What kind of bearings are in the Complainant's Exhibit of Defendant's Scale, will you examine it and see, if you can't see from there.

A. Which bearings?

Q. The bearings on the end of the shaft running through the drum.

Q. I believe they are called disc bearings, they are commonly known or probably better known as grindstone bearings.

Q. They consist of two steel wheels on which in the crotch formed by the peripheries of the two wheels the end of the shaft runs, is not that it?

A. That's true.

1507 Q. Each of these wheels is mounted on what kind of a bearing, a cone bearing, is it not?

A. A cone and needle point bearing.

Q. Cone and needle point. Now, in your opinion is that a better form of construction than the bearings which you called plain journal bearings?

A. Yes, I would consider them better bearings.

Q. Why, in what way better?

A. It is conducive of less friction when a load is placed on it.

Q. Very much less friction, would it not?

A. A little bit of friction is dangerous.

Q. Yes, and this would produce very much less friction, would it ot, Mr. Hopkinson?

A. It is pretty hard to say how much it would produce less friction.

"Referring now to my testimony as to the insertion of a fan haped dial on the lower mechanism of the scale before me. I believe that such fan dial to have the same capacity as the chart in he exhibit scale before me, should have an arc of about twenty-five nches in length. I can hardly say that there is any mechanical difficulty in the construction of a chart with an arc of that size, though I believe that the larger the piece to be lithographed or printed, the more danger there is of distortion and inaccuracy. But I have seen a lithograph of a length of twenty-five inches that was not distorted. These dial scales that I have seen with a diameter of twenty-four or twenty-five inches had a chart on them that was printed in pounds and ounces. There was no distortion noticeable on them. I have seen maps which, I understand, were lithographed and some of them are several feet long. I have no means of knowing whether they were accurate or not. Other than the danger of distortion because of the size of the twenty-four or twenty-five inch chart, I know of no mechanical difficulty in making the fan chart scale with an arc twenty-four or twenty-six inches long.

"The hand that should travel over a fan shaped chart of this kind should be not less than twenty-five inches long, and about three-fourths of an inch wide, and about one-twentieth of an inch thick. Such indicating hands are usually constructed of aluminum, and while I have no knowledge of what the weight of a piece of
1508 aluminum of the length to form such a hand would weigh, I can compute it."

(Witness was here asked to make the computation.)

"I find it would weight about 1.8 ounces. In estimating this figure, I figured that in a piece of metal twenty-five inches long, by one inch wide and one-twentieth of an inch thick there were one and one-fourth cubic inches. I took the weight of aluminum as approximately one-third of cast iron, and I know the weight of cast iron is approximately forty pounds for 144 inches of area.

With these figures I estimated the weight of an aluminum indicator hand of the size mentioned would be 1.8 ounces. The longest indicator hand for a fan scale that I have seen is about fifteen inches and would weigh about three-fourths of an ounce. I don't believe the difference in weight would interfere with the practical operation of the scale if this large indicator hand were properly mounted on knife edges and they were made with good workmanship. Most of the fan scales I know of are mounted on knife edges, and when so mounted I don't believe the length of the indicator would interfere with the practical operation of the scale, though I have never tried an indicator twenty-five inches long. All the indicating hands are counterbalanced in some way on the lower end. There would be

more friction in mounting the indicator on the journal or a pinion to be operated by a rack than there would be in mounting it on a knife edge. I could not state how much the additional friction would be, for I would have to try it out before stating. I am not in position now to say whether such an indicator hand operated through a rack and pinion over a fan chart would be operative or inoperative.

If the weight of the drum in the exhibit scale before me, Complainant's Exhibit Defendant's Scale, were fourteen ounces, and the total weight of an indicator hand when properly balanced is less than fourteen ounces, I do not believe there would be any difficulty in moving the indicator hand through the rack and pinion. The indicator hand could be balanced by putting a weight of twice that of the indicating hand on the opposite side of the knife pivot at a distance equal to half the length of the indicator hand, and the combined weight of both arms of the indicator hand would then be about 5.4 ounces.

1509 "I believe I have seen a Toledo Fan Scale with a chart capacity of twenty pounds without any manipulation of the pendulum. That was a parcel post scale which was used by the United States Government in the Post Office at Dayton. I have seen the pound and ounce scale made by the Triner Company in Chicago, not an automatic, which is a parcel post scale that weighs up to fifty pounds. This is a lever platform scale with a beam on the side. I do not remember ever seeing one of their scales with a chart capacity of fifty pounds. I do not recognize the Toledo scale mentioned as the No. 682. I only know the Toledo scales by seeing them on the counters in stores. In the Toledo scale I saw in the Dayton Post Office, the hand operated through an arc of a circle commensurate with the weight on the platform. In the Toledo scales of ten pounds, where a weight is added to the pendulum by turning a knob, if the additional weight is placed on the pendulum, such scales have a capacity of twenty pounds, and, so long as the additional pendulum weight remains on the pendulum, the scales can weigh from zero to twenty pounds. That scale is a fan scale and a computing scale.

"Referring now to my testimony relating to the substitution of a cone chart for the cylinder in the scale before me, adopting for the arrangements of figures on such chart the principle of dividing the pound graduate into as many parts as there are cents in the price per pound. This gives a considerably greater number of graduations for the higher prices per pound, say thirty cents per pound, than at the lower prices per pound, say four cents per pound. If the spaces are properly made and equally divided from each other, in the higher prices per pound the intervals are smaller. In the cone form of construction, by placing the higher value figures at the larger end of the cone and the smaller prices per pound at the smaller end of the cone, it would be possible to make a chart with the spaces more nearly equal, which is not possible on the drum of the ordinary cylinder scale. In order that a chart made as a frustum of a cone may revolve so that its reading face may be always equidistant from the front edge of the reading opening, the axis of such a cone chart must

be at an angle to the face of the reading opening. To place such a drum in position so that it will revolve in the manner mentioned, all that is necessary is to change the position of the bearings at
1510 either end of such a frustum of a cone chart to substitute such chart for the cylinder in the scale before me, Plaintiff's Exhibit Defendant's Scale. The same bearings, if placed in proper position, could be used, and if such frustum of a cone were actuated by a pinion at its end, which, in turn, was moved by a rack, it would be necessary to revolve the position of such rack until it came in line with the line of the teeth in the pinion. In the scale before me, Plaintiff's Exhibit Defendant's Scale, I see that the lower end of the rack is fastened to an intermediate device which connects with the scale lever the rack rod being threaded into a recess on said intermediate member. By revolving this rack rod to the left or right you can change the position of the rack above, and if such rack rod were turned so that the teeth meshed with the teeth of the pinion on the cone with its axis arranged at an angle, the friction would be no more or less than in the scale before me, Plaintiff's Exhibit Defendant's Scale.

"If, instead of placing such a cone chart so that its front face would be parallel with the reading glass, but were arranged upon the same axis as now exists in the scale before me, it would be necessary to keep the reading face on such cone equidistant from the front edge of the enclosing casing. Accordingly, the logical way to make the enclosing casing would be to also form it as a frustum of a cone. This enclosing casing is usually made of sheet steel, about .03 of an inch thick, and the amount of steel in the enclosing casing formed as a frustrum of a cone would be less than that required for enclosing the cylinder in the scale in question, but the material would be cut a little differently, so that one end would be smaller than the other.

Redirect examination.

By Mr. Zane:

"The case about which I testified in my cross-examination in regard to the making of the original drawing for the platform cylinder scale used by the Computing Scale Company of Dayton, was between the Toledo Scale Company and the Computing Scale Company, I think, though it might have been the Moneyweight Scale Company. At that time I did not have a copy of the drawing, but I had the original sketch on a sheet of paper, approximately nine inches
1511 by six inches, with the date and my initials on it. I have tried to remember since coming here whether the original sketch was offered in evidence or whether a copy of it was, but I don't remember whether the original was offered in evidence or not. That testimony was given in the fall of 1911 or 1912. At that time I looked up questions in regard to when the dash-pot was made on the platform scale and when the platform scale was originally made. I have later had occasion to consult my former evidence. At that time I was cross-examined by an attorney for the Toledo Scale Company—Mr. Davis, of Rector, Hibben, Davis & Macauley.

"In my cross-examination, attention has been drawn to the magnifying glass that is inserted in the opening through which the weight figures on the drum are observed. That magnifying glass was used on our cylinder scales previous to the fall of 1903. It was used on our No. 63 scale, but I could not state positively that it was used on our No. 61. I do not recall that a magnifying glass was ever used on our hanging drum scale.

"I stated that there was a spirit level on our No. 73 pendulum scale. That is necessary to a pendulum scale to enable you to tell exactly when the scale is in a horizontal position, because the pendulum system is a gravity system and should be perfectly level to weigh correctly. For instance, this scale before me, Complainant's Exhibit Defendant's Scale, is at present, out of balance eight ounces. I do not know why. We did not use the spirit level on the even balance scales made by our company, but we used it on the No. 103 scale, and No. 110 scale about the same time or soon after we used it on the No. 73. They were computing scales of the pendulum variety. In the patent to which you have just called my attention, 817,777, there is shown an even balance pendulum scale. We don't use a level on that scale, and have adjustable feet for levelling purposes, the adjustable feet being placed at each corner of the base.

"If you put a disk on the scale before us after taking off the top part of the cylinder of it, and have your disk above the member which contains the rack bar, whether the rack bar would remain of the same length or not would depend on where the center of your disk was. If the only disk were mounted above the rack bar, the rack bar would have to run to the center of the disk. It would depound on where the center of the disk was in relation to the
1512 center of the scale and position of the rack. The computing scale with a revolving hand and stationary dial that I mentioned as having seen did not have the hand revolving completely around the disk, but as near as I can recollect, the travel was over about three-fourths of a circle, or approximately 270 degrees. This scale was called the Chicago scale. I have seen it since our fire, about 1910 or 1911. I have never seen any of these Chicago scales since I saw that one, either in our factory or on the market. The counter balancing system of that scale was a spring, and there was a rack and pinion to operate the revolving hand. The dial was about ten inches in diameter. I do not remember the capacity of the scale, or how many prices or value figures there were shown. I would judge about twelve or fifteen prices per pound figures were carried on the movable hand. When, in its travel over the scale, the hand had passed through more than 180 degrees, you had to read the figures on the hand nearly upside down. If the hand had revolved through the entire 360 degrees, there would have been a place on the scale where you would have had to read figures upside down. The hanging scale made by the complainant company, the Computing Scale Company of Dayton, was a dial scale with a revolving dial and stationary indicator. That was a computing scale and was made in the year 1896, '97 and '98. I believe we made that scale later than 1898

for our foreign business, I can't say definitely, but I say we continued it until about 1900 or 1901. This was a spring scale and there was a rack and pinion operating the dial, which, as I remember, was about thirteen inches in diameter. This dial made a complete revolution. The price figures were put in a vertical line below the center of the dial. The dial was enclosed in a housing with a partial glass front and the price figures were put on a piece of metal attached to the front of the housing. The dial capacity was ten pounds, the total capacity of the scale was thirty pounds, the dial revolving three times. The dial was designed in a series of circles with short lines indicating the cents and figures opposite the five cents, ten cents, and possibly at the lower prices it might have been one cent. This chart was constructed on the No. 1 principle, and the figures were so arranged that at any position of the dial they were always right
1513 side up, and could be easily read. The figures were so arranged that as the dial revolved it brought opposite the stationary indicator and the price per pound figures leading from the frame upward to a line drawn from the center to the periphery."

I do not remember how many of these scales were made, but we made a hundred or more of them a week for a long time. On one side there was a name plate stating "Computing Scale Company, Dayton, Ohio," with a patent date stamped February 13, 1894.

"The parcel post scale I spoke of had a capacity of twenty pounds, and it was not a computing scale. This scale was a pound and ounce scale with a glass front, with no computing figures, or any other figures than pounds and ounces, as I remember it. In their computing fan scales when the Toledo Company wants their fan chart scale to weigh above ten pounds, they add a weight to their pendulum. I have seen scales made that change the price per pound figures on the indicator and other scales with the figures stationary on the indicator. The price per pound is found on the indicator hand and value figures are on the chart in the row corresponding to the particular price per pound. If the additional weight is put on the pendulum, the price per pound figures are shown on the indicator hand and they are the same price as before and the figures for the weight are shown at the upper edge of the chart. That is, the weight indications are on the outer edge of the chart. To weigh 14 pounds I am not certain how they arrive at the value figures. They have changed their scale and I am not as thoroughly familiar, I have not used the scale and have not demonstrated the scale."

Recross-examination.

By Mr. Meads:

"The pendulum scale shown in the patent No. 817,777 is a pendulum scale in combination with an even arm lever. There is no spirit level on that scale. A great many of those scales are sold in this country and also in England and Australia. On those we sell in this country, we do not now put spirit levels. I believe we do not put spirit levels on those sold in the State of Ohio, though I am not

sure whether we are selling any of them in the State of Ohio.
1514 I do not believe this scale is sold in the State of Wisconsin. We put spirit levels on all scale- that go to Wisconsin. I do not know of any scale that goes into the State of New York, that is not equipped with a spirit level. They are, to the best of my knowledge, equipped with the spirit level there, except we make some small spring scales, we do not put levels on—two pounds and five pound capacities. I believe we have sold some scales manufactured under this patent in New York with a spirit level. Those are small spring scales. I believe we have sold some of those scales made according to patent 817,777." When we get orders for different types of scales, it depends somewhat on where they are to be used, as to just what their equipment is, I think we first equipped our spring scales with spirit levels within the last five or six years. In the scale shown in this patent No. 817,777, we adjusted the scales by turning the screws on each corner of the base, and we determine when the base is level by observing when the indicator is absolutely on Zero. That is a pendulum scale, and you can determine level position on this about the same as on the spring scales. Most manufacturers adjust their scales at the factory in a level position, and when, by the use of levelling screws, we bring the indicator to zero, we assume that the scale is level. So far as I know, the scales of the Toledo Scale Company are adjusted at the factory in level position, though I have never been in the Toledo Scale Company's factory. In 1902, when we began the installation of spirit levels on our pendulum scales, we placed the spirit level in only one direction on the scale, at right angles to the axis of the pendulum and parallel to the chart. In the field, the man on whose counter the scale was to be used was in the practice of putting a piece of pasteboard under the corner of the scale to keep it from rocking, and when it stopped rocking he assumed it was level. If the counter on which the scale was used sloped, but in a perfect plane, the four feet of the scale might rest at all points on the counter, and the man might use the scale even if it were not horizontal. If the slope were not more than one-fourth of an inch in two or three feet, I believe the scale would not make an appreciable difference. If more than a quarter it might give some trouble. I believe the pendulum would crowd to
one side or the other, and the trouble would be indicated by
1515 the scale not registering as it should. But the first thing you would have to indicate it was not level would be that the scale was working badly. So the equipment of these scales with another level—the two way level—was an improvement over the equipment of the scale with a single level. The other fan type pendulum scales that we manufactured, types 301 and 310 were pendulum scales and we equipped them with a spirit level. We started to make these scales a little after we began the No. 73 scale and we made them until the spring of 1911. We discontinued making the other pendulum fan scales at that time to the best of my recollection.

"Q. Now, in this scale that you say made a three-quarters revolu-

tion do you know whether the prices per pound on the indicating hand were printed in more than one direction, some being printed upside down and others downside up?

"A. I don't remember seeing but one row of figures.

"Q. Well, have not you seen indicating hands printed in the manner in which I suggest so when the hand gets to the bottom the figures which were on such hand when such hand started would be then in an upright position?

"A. No, I don't remember seeing them.

"Q. You have not seen them?

"A. No, I don't recall ever seeing an indicator of that description.

"Q. In other words, figures which at the time with the hand at the top of the scale are standing on their head, when the hand gets to the bottom of the scale would then be standing on their feet, would they not?

"Mr. Zane: We object to that as absolutely unintelligible.

"A. I don't understand that question, Mr. Meads.

"Mr. Zane: Does he mean have his figures on the revolving thing upside down? It is impossible to tell anything about it.

"Mr. Meads:

"Q. Have you ever seen an indicating hand with two columns of figures on, one in which the figures as the scale was at rest without anything on the pan or platform are in an upright position and right beside it a row of figures printed bottom side up?

"A. On the same indicator?

"Q. Yes?

"A. No, sir.

1516 "Q. You have never been fortunate enough to see one?

"A. I have never seen one.

"Q. Who has charge of your patent department at Dayton?

"A. We have not a resident——

"Mr. Zane: We object as not cross-examination.

"The Master: Objection sustained.

"Mr. Meads: Have you charge of the patent department at Dayton?

"A. No, sir.

"Q. What you know about the contents of patents then is merely heresay?

"Mr. Zane: We object as not cross-examination. He has not testified to the contents of any patent.

"The Master: I don't think he has attempted to give the contents of a patent.

"Mr. Meads: What object was there in counsel asking this witness to testify that on this type of revolving scale there was the words "Patented February 13, 1894," was that illuminating as to the appearance of the scale?

"The Master: I don't know, I think he had a right to describe the scale. I don't understand that that proves however, that it was a patented scale.

"Mr. Meads: Well, I think I have a right to show by this witness that he does not even know what feature, it may have been the revolution of the dial. Certainly the object of counsel was not to show there might be a rose bud at the side of the scale lithographed, the object of the examination was to get in the word "patented."

"Q. These words which you have described as stamped on this dial scale were stamped there at whose direction?

"A. The superintendent of the factory.

"Q. As to why they were stamped there you know nothing except that he gave directions, is that all?

"A. That's all.

"Q. Where were you on February 14, 1894?

"A. February 14, 1894?

"Q. Yes.

"A. It is too far back for me to remember.

"Q. Where were you on February 12, 1894?

"A. Oh, in Dayton, Ohio.

"Q. Do you know where?

"A. February 14, 1894?

1517 "Q. Yes.

"A. That's going back before I went to the Computing Scale Company.

"Q. Yes.

"A. I was with the Indianapolis Switch & Frog Company.

"Q. Do you remember what you were doing that particular day?

"A. No.

"Mr. Zane: Oh, we object as absolutely silly.

"Mr. Meads:

"Q. How do you remember this day, February 13, 1894, Mr. Witness?

(To Mr. Zane:) It is very silly.

"A. The date was stamped on those scales that we were making in 1896, '7 and '8.

"Q. Well, where did you get these figures, February 13, 1894?

"A. I can see that figure before me now. It's a figure that has always stood out to me.

"Q. What were the marks on the 63 scale at that time, patent marks?

"A. I don't recall.

"Q. Just give them, Mr. Hopkinson?

"A. Give them?

"Q. Yes.

"A. I could not give the exact date on those scales.

"Q. Could you give any one of them?

"Mr. Zane: We object as not cross examination.

"The Master: It is testing his memory he says.

"A. Yes, I understand the point.

"Mr. Meads:

"Q. Can you give any of the dates on the 63 scale?
"A. I could not give them correctly now.
"Q. The 63 scales you manufactured in quantities fifty times that this dial scale, didn't you?
"A. Yes.
"Q. But those don't stand out, do they, Mr. Hopkinson?
"A. Not as clear as February 13, 1894.
"Q. No.
"A. I don't know why I remember that, but it stands out very clearly.
"Q. This parcel post scale you have been talking about was an automatic scale, was it not?

"Mr. Zane: We object. He has been all over that thing once on cross examination.

518 "Mr. Meads: No, we have not. I just asked him one question, was it a computing scale.

"The Master: You went over that on your cross examination, Mr. Meads.

"Mr. Meads: I will show in a sense it is a computing scale. He said it was not a computing scale on his redirect. I didn't have him describe it.

(Question read.)

I asked him if it was an automatic scale.

"The Master: He may answer that.

"A. Yes.

"Mr. Meads:

"Q. On the hand that travelled across the dial there were various zones marked, were there not, zone 2, zone 3?

"A. I am not positive on the scale I saw in the Dayton Post Office whether it was a strictly pound and ounce scale or a parcel post and gave the value of the weights.

"Q. Well, what is the best of your knowledge as to whether it gave the value of the weights?

"A. The scale stands out in front of you, has a plate glass in front, and you see through the entire scale, and I don't know whether the value would be on the glass.

"Q. As a matter of fact, have you any recollection at all of what was on the scale in question?

"A. I distinctly know there were pounds and ounces.

"Q. Yes, there were pounds and ounces, that's a safe assumption on almost every scale, is it not, Mr. Hopkinson, that's safe?
"A. Yes.
"Q. How, beyond the pound and ounces do you remember what was on the hand that went over the dial?
"A. No, I don't.
"Q. So far as you know, it may have been a scale that showed the charges to be charges for various packages in different zones, might it not?
"A. It could.
"Q. It could be?
"A. Yes.
"Q. The amount of friction in such a scale would not be increased or lessened as to whether those charges in various zones were printed on the hand or not?

"Mr. Zane: We object as silly.

"A. No, sir.

"The Master: That does not need any test, of course.

1519 "Mr. Meads:

"Q. At the time that the Government bought these parcel post scales did you see the specifications?

"Mr. Zane: We object as not cross examination.
"The Master: He has said it is not an automatic scale.
"Mr. Meads: No, he said it was an automatic.
"The Master: That it was an automatic scale. He may answer that question.

"A. I have seen specifications for parcel post scales, but I could not state just when I saw them, whether it was at the time I saw your scale in Dayton or not.

"Mr. Meads:

"Q. From your knowledge of those specifications don't you know that they were required automatically to give the value in different zones?
"A. That part of the specifications I remember.
"Q. You remember that, don't you?
"A. Yes.
"Q. And they did so require, did they not?
"A. Automatic scales, yes."

WILLIAM SLATER, a witness on behalf of plaintiff, testified as follows:

Direct examination.

By Mr. Zane:

"I am the William Slater who has already testified in this case. I have a specimen list of scales in the year 1911 that were not delivered at all, that were subject to scales. They are both cylinders and fans.

"The witness here produced a list.

"That list was taken from our working papers which I have already testified to and had here in court, and those are the papers that were inspected by the representatives of Price, Waterhouse & Company. This list is exhaustive. The list gives date of sale and amount of sale and what was entered on the book as to the disposition. It is not exactly the date of sale. It is the date entered in the debit of the account in the Charge Back account. I did not make this list up myself, but I have checked all the items over and I found all these items on the working papers. The list was made up by Mr. C. M. White.

"I have a list of the second-hand and rebuilt scales in the year 1911 made up by Mr. White, but I have checked the items over. I checked the items with the working papers for the year 1911. It consists of cylinder scales, fan scales and exchange scales. The cylinders are Toledos. The fans are Toledos and the exchanges are scales of other makes, Dayton and Stimpson. I have the second-hand and rebuilt scales separate.

1520

"Mr. Meads: I think I will object to the witness reading from an instrument which was made by some one else, from notes made by various parties from books of the Toledo Scale Company. If Mr. White is accessible, Mr. White should be here.

"Mr. Zane: He has checked it.

"The Master: So far he is simply describing the general outline.

"In this list the letters 'S. H.' stand for second-hand and the word 'rebuilt' explains itself." The items of the different matters are entered here and then a recapitulation.

"Q. Now, I wish you would tell us the totals from the recapitulation.

"Mr. Meads: I certainly object to that, this fourth hand testimony.

"The Master: Well, Mr. Zane, you are asking now the contents of a written paper.

"Mr. Zane: Yes, sir.

"The Master: I will sustain the objection.

"Mr. Zane: On the grounds that his checking of it is not sufficient?

"The Master: Well, he is giving the contents of the paper itself.

I suppose if anything is competent testimony as to what the paper contains, it is the paper itself.

"Mr. Zane: Well, we have not done that before during the trial of the case, we have always testified or had testimony taken from the results of the detailed examination.

"The Master: I don't know that you are bound to introduce that paper unless you wish to.

"Mr. Zane: No.

'The Master: And that if this witness himself knows that these figures are correct, I think he might use the document to refresh his memory, but as I understand the testimony so far, this witness does not know that they are correct.

"Mr. Zane:

"Q. I understand you to say you checked this?

"The witness continued:

"I checked this statement. I can say it is correct. I checked all the items, each item separately is represented by my check
1521 marks down the side of each item and I made the check after consulting the working papers and finding it correct.

"Q. Now, using that paper, tell us what the recapitulation shows in total?

"The Defendant objected, and the witness continued,

"These working sheets were made under my supervision by different men working with me at the time and were made at Toledo and taken from the books of the company by different persons whom I was working with.

" Mr. Meads:

Q. When did you prepare the paper that's in your hand?

"A. Well, this was prepared by Mr. White. I don't know when. I don't know the date.

"Mr. Meads: Do you know whether it was five years ago?

"A. That would be impossible.

"Mr. Meads: That would have been impossible, would it not?

"A. Yes, sir.

"Mr. Meads: Was it more than a week ago?

"A. Yes, it was more than a week ago.

"Mr. Meads: Well about how long ago?

"A. I don't know.

"Mr. Meads: Two weeks ago?

"A. I could not say. It may have been either towards the end of last year or the early part of last year. I checked it last week. Mr. White is in the city. He is in Chicago.

"Mr. Zane:

"Q. Now, Mr. Slater, give us the result of that recapitulation?

"The Defendant objected and the objection was overruled.

"Mr. Meads: I object for the further reason that the witness is ow reading from a written instrument. If anything is competent, t is the instrument itself and not the contents as narrated by the itness.

"The Master: I don't understand, Mr. Meads, that that rule ap- lies to a case where one person makes an examination of papers nd sets down on those papers the result of that examination, that's ot a contract, it is not a written contract, it is a memoranda with hich he may refresh his recollection without introducing the docu- ent itself.

"Mr. Meads: He is now, your Honor please, purporting to read from an instrument in his hand.

1522 "The Master: Yes, from a memoranda, not a contract but from a memoranda made by him from books. Now, of ourse a man could not remember all those figures. After making n examination he would have to put them down on paper, but I don't understand that makes the document such a paper as comes ithin that rule that he may not use the information on that paper ith which to refresh his recollection.

"Mr. Meads: The only information on the paper which is in the handwriting of the witness, if the court please, are check marks.

"The Master: Yes, I know that, but supposing a case where the books were voluminous and were not themselves introduced in evi- dence and you set somebody on the books to get certain information from them, and of course there were figures and they put them down on paper and come into court with the paper, could they not read off from that paper the figures they obtained from the docu- ments that were not in evidence and from which they obtained those figures.

"Mr. Meads: I can conceive possibly that the man who made the figures might, but I don't know that anybody else could.

"The Master: Would there be any difference between that docu- ment and one he made himself if he checked it over afterwards?

"Mr. Meads: Let me see that paper.

"The Master: It may be understood if you desire that all this testimony goes in subject to the objection that you have made to the testimony so far."

The witness continued:

"Second-hand cylinder scales 68, Toledo cylinders. Toledo fans, 221. Exchange scales of other makes, 113, making a total of 402. Rebuilt Toledo cylinders 84, Toledo fans 325, exchange scales 1320, total 1729. That is for the year 1911."

Cross-examination.

By Mr. Meads:

"This list headed 'Number of scales sold on Rebuilt and Second Hand Scales Account for the year 1911' is in the handwriting of Mr. White, who is now in Chicago. When I checked over the list last week I put a bracket opposite the 'Sections 1 to 5,' and wherever I found slight errors I made slight alterations. That is all of the list that is in my handwriting.

1523 (Counsel for defendant here moved to strike out this witness's testimony, but the Master denied the motion.)

CARROLL MINER WHITE, called a witness on behalf of the plaintiff:

Direct examination.

By Mr. Zane:

"I am an accountant employed with M. M. P. & Co., since July 1, 1914. I was in Toledo while the testimony in this case was being taken and was present when Mr. Bowman was testifying. While at Toledo, I prepared a list for the year 1911 of second hand Toledo Cylinders, second-hand Toledo Fans, second-hand exchanges, rebuilt Toledo Cylinders, rebuilt Toledo fans and rebuilt exchange scales sold in the year 1911.

"All of the writing and the figures on this list excepting one or two items and the check marks ,and the corrections are in my hand writing. The source from which these figures were taken was from our analysis of the second-hand and rebuilt scales. The analysis is a part of our working papers and were made up in Toledo in the fore part of October, 1915.

"I also prepared the statement entitled "List of items included in Charge Backs for 1911 which do not represent pulled or repossessed scales but which appear to be cancellations of credits of U. S. Sales."

"This was prepared in Chicago from the analysis of the charge Backs for the year 1911. These entries were correctly made by me. They are a copy of the analysis. One or two items I did not prepare. One of them in red dated February 16, 1911, voucher 726, fictitious order charged to Walker's shortage account, and the other in black, dated May 31st, 1911, amount $135, refused. All the rest are mine."

"This list has not taken in all of the Charge Backs but merely samples of them. The items shown in red ink represent fan scales and those shown in black represent cylinder scales.

(At this point the list was offered for identification and marked Plaintiff's Exhibit No. 75.)

1524 Cross-examination.

By Mr. Meads:

"I do not know whether Mr. Hall or Mr. Zane told me to prepare this paper now marked Plaintiff's Exhibit 75. It was prepared after I had been to Toledo and is the first list of this kind that was prepared. "The Witness here stated his experience as an accountant.)" The various sales shown on this list were selected by myself at random and transcribed immediately to these sheets, no further working papers having been made up for this list. The entries at the top of the list with reference to "Date" are taken from the voucher, and would also be the date of entry on the books. The column headed "section 1" refers to the section in the sales journal in which the entry was made. The column "voucher No." has reference to the voucher from which the information was obtained, the next column "Number" has reference to the quantity of scales involved, and the "Amount" was taken from the voucher and sales journal used in conjunction. In the next column headed "Reason and disposition" appears notations on the Charge Back voucher such as "Unable to effect Delivery," "Scale not delivered," Other notations which appear under the caption "Reason and disposition" such as "Unable to effect delivery" etc. were taken from our working sheets, and there is no account or separate compilation similar to this on any books or papers of the Toledo Scale Company. This is a list of entries that are on their books, a haphazard sample lot of entries, picked at random. There are no totals.

WILLIAM SLATER recalled for further examination:

Direct examination.

By Mr. Zane:

"A number of the entries on Plaintiff's Exhibit No. 75 are in my handwriting. These particular entries are exhaustive of the year 1911 in so far as regards scales not delivered or 'Unable to effect delivery' or refused or fictitious orders, and cover all transactions of that character for the year 1911, which I checked with our analysis.

1525 I went through our analysis, took every transaction of that character, checked all the items, and I know that those entries are correct, according to the working sheets.

Then testimony as follows:

Mr. Zane: We now offer in evidence Plaintiff's Exhibit 75. The objection has been made that the paper ought to be offered, so we offer that.

Mr. Meads: Your Honor please, to the entry of Exhibit 75 the defendant objects. The witness in whose handwriting all the instrument is save some minor corrections says that the instrument is only one of sample transactions taken haphazard here and there, the

witness White. The instrument does not purport to be a statement of any particular account on the books of the defendant company, but purports to be copies of working sheets of certain extracts from such books and is not evidence of the best character of the facts sought to be proven. Did your Honor look at this?

The Master: I see what it is.

Mr. Meads: It is no summary. The witness who prepared it says it was prepared at random here and there.

Mr. Zane: And the other witness says he went through and added things, it takes the evidence of two witnesses to make that paper complete.

The Master: Well, I don't know for what purpose it is introduced, and it may be as either witness says, a complete list or a list made up at random, that I do not think would affect the admissibility of it.

(Said document entitled "Toledo Scale Co. List of items included in Charge Backs, year 1911, which do not represent pulled or repossessed scales, but which appear to be cancellations of credits to U. S. Sales," heretofore marked for identification Plaintiff's Exhibit 75, so offered, received in evidence and marked "Admitted.")

Mr. Zane:

Q. Now, Mr. Slater, I draw your attention to the paper that has been marked Plaintiff's Exhibit 76, and there are certain corrections on this paper. To those I want to draw your attention. I first draw your attention to a correction of 13 to 12, did you make that?

A. Yes, sir.

Q. I next draw your attention to a correction in the total of 182 to 181, did you make that?

A. Yes, sir.

Q. Another correction is that of 75 to 76, did you make that?

1526 A. Yes, sir.

Q. Another correction is 291 to 292, did you make that?

A. Yes, sir.

Q. Another correction is of 112 to 113?

A. Yes, sir.

Q. Did you make that?

A. Yes, sir.

Q. Another correction is of 326 to 325, did you make that?

A. Yes, sir.

Q. Another correction is 1319 to 1320, did you make that?

A. Yes, sir.

Q. Another correction is 75 to 76, did you make that?

A. Yes, sir. I don't know whether you gave that before or not.

Q. I gave that wrong before. I said correction 76 to 75, didn't I?

A. It ought to be 75 to 76.

Q. 75 to 76?

A. Yes.

Mr. Zane: Now, we offer in evidence Plaintiff's Exhibit 76.

Mr. Meads: To which we object, if your Honor please, for the same reason.

The Master: Objection overruled.

(Said sheet entitled "Toledo Computing Scale Co. Number of Scales sold on Rebuilt and Second Hand Scale Sales Account—year 1911," heretofore marked for identification Plaintiff's Exhibit 76, so offered, received in evidence and marked "Admitted.")

JAMES HALL, recalled for direct examination by Mr. Zane:

"I heard the testimony of Mr. Bowman in regard to the two entries dated November 23, 1911, with reference to the Stock Inventory Account which were carried into the Surplus Account and from Surplus into the Reserve for Losses. In my opinion, the disposition of that inventory $23,885.34 as a cost of second hand scales, as treated in the account made up by P. W. & Co. called Ex-1527 hibit 47 of plaintiff and 27 of defendant is not correct. The account is charged with the Rebuilt and Second Hand Inventory of $3,896.25 and the Loaner Inventory of $2,991.40 on January 1, 1911. Throughout the year 1911 and up to November 1st there were considerable charges in the accounts for scales taken in exchange. The effect of that is, that assuming the inventory of January 1, 1911, to have been a correct inventory at that date, the inventory of November 1, 1911 must be a duplication of the items previously charged as an expense. If we assume the inventory of January 1, 1911, was not correct and the November 1, 1911 inventory should be used, and that the January inventory would have exceeded the amount stated here by the amount of inventory taken November 1, 1911 it is obvious that the 1910 profits are by reason of the January 1st inventory understated, the result of this being that over a period of two years, assuming the inventories of January 1, 1910 and December 31, 1911, and taking the two year period 1910 and 1911 would be an understatement of profits by this procedure of $23,885.34, the amount of this inventory.

"I would not agree with the method used by P. W. & Co. in their account wherein they compute their Losses on Gross Sales, especially bad debt losses should be figured against net sales or against the business that finally remains placed. Now in this case there were many sales that were duplications where a scale is sold to a customer, taken back from him, and sold to a second customer, this sale would be considered twice in figuring gross sales. Obviously there is no bad debt loss necessary on one or the other sale. The bad debt loss you should figure against the sale that remains placed. The first sale is not necessary. The second sale is the only one carrying a bad debt loss. Then again in some cases we find in the gross sales items of cash for a scale which was lost. There is a duplication there so that obviously no bad debt allowance is necessary on one or the other of the sales because when you get down to the last analysis

the only business that can carry any expense of any kind is the business that remains placed in the hands of the customers, not the business you may do. The business that does not remain placed does cost the company certain expenses, but that is incidental to the business. In every business there is an element of returned stuff, but what carries the profit or the loss is the business that remains placed, or the net sales. If the scale is sold and taken back there is an expense but no bad debt loss upon that, just simply a cancellation."

1528 "The Master: Suppose you take it back because they don't pay the whole amount?

"A. Then there would be a bad debt loss on the entire amount."

"When figuring the Losses on net sales we used all the losses found on the books which figure about 2.91% and we increased this to 3% of the net sales.

"In the account of P. W. & Co. the division of certain expenses are made on the basis of gross sales. In my judgment under ordinary circumstances the expenses should be on the basis of net sales. In exceptional cases; there might be exceptional cases where you have to apply expenses against a department on th basis of gross sales, but I don't see any exceptional instances here. The returns appear to have been normal at all times, and the business that remained definitely placed with th customers is the business that has got to carry the expense.

"I can't see any particular reason or justification for dividing the allowances, manufacturing cost and commissions back through the years 1906, 1907, 1908, 1909 and 1910 on the 1911 basis as shown by P. W. & Co. in their account, unless there is more definite information about the relation of the various expenses as between those years.

"I have prepared a comparative statement of the account put in by P. W. & Co., with the account already in of M. M. P. & Co., dealing with cylinder scales for different years. The figures for P. W. & Co., are taken from the testimony. On M. M. P. & Co.'s original statement, Exhibit No. 40, the item of the repairs was charged as a manufacturing expense. No, the repairs were charged as a Commercial & Selling expense and Freight Inward, Insurance and Taxes were charged as Commercial and Selling Expenses. On the P. W. & Co. statement Insurance add Taxes were charged as Manufacturing Cost, and they created a Second Hand Account and charged to it Repairs and Freight Inward. The account which I have made up corresponds to the totals shown according to their method. No amount has been included for the 1839 cylinder scales on hand at September 3, 1912, nor any part of the Canadian business. The value of the business developed during this period has not been considered in this statement. The totals are corrected and the notes state facts. This statement was stricken out on motion by counsel for defendant.

On the following page of this report is shown a comparative

statement of profit and loss on manufacture and sale of cylin-
1529 der scales in the U. S. for the period of January 1, 1906 to August 31, 1912, by years as per statement of P. W. & Co., and M. M. P. & Co. The profits should be in red and the loss in black. There are items in the year 1911 of P. W. & Co.'s account which are left blank because I was unable to follow the figures put in evidence by Mr. Seatree in making up his account, but the totals given come off the summary which he offered in evidence. He gave the figures but I could not follow them. The difficulty must have been with me. I was unable to reconcile the figures he gave with the profit of $11,191.19 shown by him.

"The next page of this statement shows comparative profit on manufacture and sale of cylinder scales, stated on a percentage basis of net sales as per P. W. Co.'s and M. M. P. & Co.'s, statements and are mere matters of calculation. On this page profits should be in red and losses in black."

On the following page is a comparative statement of profit on manufacture and sale of cylinder scales, stated upon a 'per scale' basis based on P. W. & Co.'s and M. M. P. & Co.'s statements. On this statement for the year 1906 according to P. W. & Co.'s statement for that year, the cost of net sales is 16.94% of the net selling price. The percentage of commission is 31.36% and so on through commercial and selling overhead, losses, depreciation, etc.

The next page of this statement covers the fan scales and is made on the same basis as cylinders.

"In the account which I have produced, marked 'Reconciliation of profits of cylinder and fan business ascertained by M. M. P. & Co. and by P. W. & Co., the first figure is 'Ascertained by M. M. P. & Co. $420,311.13.' This figure is the aggregate of the profits shown on our preceding statements, the statement of cylinder and the statement of fan business. The figure I have given as ascertained by P. W. & Co. is taken from the same source, and the difference is a mere matter of calculation—subtraction.

"The next figure 'Losses of agents' accounts, 1906 to 1911, calculated by P. W. & Co. on gross sales and by M. M. P. & Co. on net sales.' The excess allowance put in by P. W. & Co. has been taken from the same source, the two statements I have just testified to of fan and cylinder profits, by aggregating all the losses and calculating. The same applies to all of the other figures upon this ac-
1530 count entitled 'Reconciliation of profits of cylinder and fan business ascertained by M. M. P. & Co. and by P. W. & Co.'

"I now produce a statement marked 'Statement of Experimental, Litigation and Patent Expenses charged in accounts covering period from January 1, 1906, to August 31, 1912, showing apportionment as between cylinder and fan business, prepared according to method adopted in Basis No. 1.' Certain of the figures are taken from the plaintiff's Exhibit No. 40 and others from the plaintiff's Exhibits Nos. 8 to 15, inclusive.

The several statements produced were after the testimony of William Slater introduced in evidence and marked as follows:

"Statement of Profits on Manufacture and Sale of Cylinder scales," marked for identification "Plaintiff's Exhibit No. 77."

"Statement of Profits on Manufacture and Sale of Fan Scales," marked for identification, "Plaintiff's Exhibit No. 78."

"Reconciliation of Profits of Cylinder and Fan Business Ascertained by M. M. P. & Co. and by P. W. & Co., marked for identification "Plaintiff's Exhibit No. 79."

"Statement of Experimental, Litigation and Patent Expenses," marked for identification "Plaintiff's Exhibit No. 80."

WILLIAM SLATER, recalled for direct examination.

By Mr. Zane:

"I worked out the calculations given in Exhibits 77, 78, 79 and 80 and they are correct. I took the various figures for cylinder scales as contained in Exhibit No. 40. The fan figures of these statements have not been put in evidence before, but were taken from our working papers, covering the total number of fan scales sold."

Mr. Zane: We now present in pursuance of our offer heretofore made the certified record from the District Court of Southern District of New York in the case heretofore mentioned consisting of the bill of complaint, the answer, the amendments to the answer, the replication, the opinion of the court on the merits, the decree of the court dismissing the case and the decree of the court entered upon
1531 the receipt of the mandate of the Circuit Court of Appeals, affirming the decision of the lower court.

Mr. Meads: To which offer and to each of the instruments mentioned in such offer the defendant objects on the ground that they are irrelevant and immaterial, and further objects that they cannot be offered as matters adjudicated or heretofore in issue between the parties to this suit, because the parties to the suit in the exhibits sought to be offered are different from the parties in the suit at bar; to that portion of the offer which includes the opinion of the court I make especially further objection that the matters sought to be shown by such opinion are properly shown by the decree and the opinion has no place in such an offer.

The Master: Objection overruled.

(Said certified records from District Court of Southern District of New York in case of Computing Scale Company and Jonathan B. Hayward vs. Toledo Computing Scale Company, consisting of bill, answer and amendments thereto, replication.)

Cross-examination.

By Mr. Meads:

"The paper marked Plaintiff's Exhibit No. 77 was prepared within the last six weeks by Mr. Slater and myself. The original computations were made under my instruction as to methods by Mr. Slater.

Most of the handwriting on this paper is Mr. Slater's. I have the original working sheets.

The witness produced them and stated the handwriting thereon as that of Mr. Slater with several notations by himself.

On page 1 of this Exhibit is shown the total profits before charging interest as $234,479.64. This was taken from Defendant's Exhibit 61 and the testimony of Mr. Seatree in support of that statement.

"On the first page of the working sheets from which we prepared this statement, we show the distribution of the Commercial and Selling Overhead to net scales as 28.6839%. On page 2 the Commissions are shown and pro rated to the sales of cylinder, fan and second hand scales on the basis of the total commissions to total net sales, resulting in 34.1962%. The Commissions were applied to each division, and we treated all of them as though the same work
1532 had been placed on each branch. This method was followed in each year except 1911 and 1912, for which I accepted the commission figures stated in the statement given by Mr. Zolg at the commencement of the case for cylinder scales and pro rated the balance of the commissions as between fans and second hands in the same method as applied in the earlier years. I accepted Zolg's testimony as regards the commission. I could not ascertain for myself, I did not know how, and Mr. Zolg's was the most reliable testimony to my knowledge. I did not take the trouble to analyze this account, either from customers' ledger accounts or in any other way. For the statement of profits of Exhibit 78 we used our working papers. It does not refer to anything that is in this case as an exhibit by M. M. P. & Co. up to this point.

"By way of example, in the comparative statement of profit and loss on manufacture of fan scales for the year 1910 we show the cost of sales given by P. W. & Co. as $159,726.47, and as our cost $192,306.46. Our cost was obtained by using for fan scale costs the residue after ascertaining the cost of cylinder scales by taking the average labor and material cost testified to by Mr. Zolg and contained in the statement prepared by him.

"We assumed that the statement prepared by Zolg for the years 1911 and part of 1912, concerning the cost of cylinder scales applied through all the other years and to that we added the overhead, and assumed after that, the cost so obtained applied throughout the entire period for cylinder scales, and that the residue applied to fan scales. I made no effort to determine the manufacturing cost of fan and cylinder scales during the year 1906 down to 1910. My whole account is predicated upon charging the entire residue of the manufacturing cost to fan scales after ascertaining my cylinder cost by multiplying the number of cylinder scales sold by the cost of scales given by Zolg, and adding thereto the overhead.

"The Commissions to Agents for the year 1910 were pro rated against the net sales, the total commission against total net sales, and divided through the three classes of sales. I assumed the three classes of sales were sold in the same way and for substantially the same rate of commission. I followed this method as to the pre-

ceding years. It was the only method to adopt. An examination of the commission account was practically an impossibility.

1533 "The Losses on the Agents' and Customers' Accounts in the year 1910 were computed on the basis of 3% of net sales. I assumed the loss averaged 3% throughout—on all three classes of scales.

"The exhibit No. 79 contains a statement entitled 'Reconciliation of profits of cylinder and fan business ascertained by M. M. P. & Co. and P. W. & Co.' The first item $420,311.13 was taken from Exhibits 77 and 78, and the item $363,085.28 from the same exhibit, showing a difference between the two items of $57,225.85.

"The difference between the Losses on Agents' Accounts as calculated by P. W. & Co. and M. M. P. & Co. is the difference between taking 3% on gross sales by P. W. & Co. and 3% on net sales by M. M. P. & Co., and that makes a difference of $13,000.00, less excess of M. M. P. & Co. allowance in 1912 by taking Zolg's account in 1912."

"The item entitled 'Inventory revaluation' amounting to $31,690.51 covered a revaluation of the inventory of January 1, 1909, or December 31, 1908, that came on the books at the beginning of 1909. And the year 1909 was therefore charged with an additional eight and one-third per cent increase in valuation of the scales inventoried, but no credit was given at the end of the year 1909. The difference was between valuating the inventory at 25% and 33⅓% of the selling price. I made no investigation as to the fairness or correctness of this revaluation but assumed the figure of January 1, 1909, was correct because of it being on the books. My main inquiry was as to whether while 1909 was charged with that extra, credit had been given in the earlier years, and as it had not, I put it on this statement.

"To offset this $31,000.00 there was a corresponding entry on the books to wipe out the Organization account. This account was put on the books at the incorporation of the company, and while there are two entries on the same voucher, one increasing the Scale Inventory and one crediting Profit and Loss to the extent of writing over the Organization account of $192,769.45. I do not know what governed Mr. Theobald's entry. He made an entry increasing the value of stock on hand at December 31, 1909. The one thing I do know is that it effected the profit in that it reduced the profit of 1909 without giving corresponding credit in 1908. On your bookkeeping that was not offset."

1534 "This entry of $31,690.51 had the effect of reducing the profits of the period by that amount, that is the profits for the period of 1906 to 1912, because at January 1, 1909, an entry arbitrarily increasing the opening inventory by that figure was put on the books. If the books were correctly kept the credit entry would have to be made at December 31, 1908.

The effect was that they simply injected an item of $31,690.51 and took that away from the profits of that period by charging the profits of 1909 with that extra 8⅓%. Now, it perhaps would be clear if I say the company always called the account that your ordi-

narily knew as the Surplus account the Profit and Loss account on the ledger. When you charge the profits of 1909 with that eight and one-third per cent you have got to put the corresponding entry in the preceding year.

At *the* January 1, 1908, you had your inventory. At the end of the year you closed with a small inventory. At the opening of the new year you raised that inventory. What you had accumulated during 1908 were shown in this stock on hand. Whether the increase from twenty-five to thirty-three and one-third per cent in valuation was warranted would make no difference. I copied the journal entry and the voucher because that gives the story of the transaction. It is a copy of the voucher signed by H. Theobald, Treasurer. Mr. Zane never saw the entry.

"On Exhibit No. 80 we took the details of the accounts from the monthly statements, the percentage charged against cylinder scales from Exhibits 77 and 78. We got the total amount of Experimental account, and then found what part of it had been charged to cylinder scales. In the year 1912, we used the figures for Experimental taken from Plaintiff's Exhibit No. 9 as being $11,714.62, and ascertained the proportion of overhead applying to cylinder scales by making the calculation after eliminating that item. The total overhead for that period was $91,820.02, which was 68.89% of the Direct Labor and Material, $133,288.88. The proportion of that overhead of $91,820.02 which applied to the cylinder business was $31,898.23, that being 68.89% of the total Direct Labor and Material applied to cylinder scales of $46,157.98.

1535 The division of the Experimental Account applying to cylinder business was made in the same manner. You will not find any figures on the books for the divisions of this account I have applied to the fan and cylinder business.

"The distribution of the Patent Expenses is on the basis of net sales. This was done because the Patent Expenses has originally been included with Commercial and Selling Expenses which was put in on the basis of the net sales.

Redirect examination.

By Mr. Zane:

"On Exhibit No. 80 the item referred to as Experimental Account is found as part of the Manufacturing Cost and carried under the heading of Overhead. This manufacturing cost is made up of items of direct labor and material and all items known as general factory overhead expense. In Mr. Zolg's account he arrived at the proportion of the total factory overhead that was apportionable to cylinder scales, by ascertaining the proportion of the factory overhead to the combined total of direct labor and material. He then took that percentage of the labor and material shown for cylinder scales as the factory overhead apportionable to cylinders, and this plan was followed by us in our Exhibit No. 40.

"The Litigation and Patent Expense Accounts are found in Commercial and Selling Overhead and in our account we followed the

plan adopted by Mr. Zolg and pro rated these expenses on the basis of net sales.

WILLIAM SLATER resumed the stand for further examination:

Cross-examination.

By Mr. Meads:

Q. Mr. Slater, when did you start work on Exhibits 77, 78, 79 and 80?

A. Anywhere from four to six weeks ago.

Q. Well, is that the best recollection you have as to the time you started?

A. I don't know the exact date. It would be over that period of four to six weeks.

1536 Q. Do you know how much time you spent on that?

A. Well, I spent a considerable portion of that time.

Q. Well, you spent upwards of four weeks you think on them?

A. It may have run probably three to four weeks.

Q. Up to within a week ago?

A. Yes, it was probably a week ago.

Q. A week ago?

A. Yes.

Q. Now, in the preparation of those exhibits did you use your working papers?

A. Yes.

Q. How?

A. Used these papers. (Referring to working papers.)

Q. Well, the typewritten exhibits were taken from these yellow working papers, were they not?

A. They were taken from a summary made up from those papers.

Q. And when did you prepare these yellow sheets concerning which I have interrogated Mr. Hall today?

A. Prepared those over the period I have just testified about.

Q. Well, about four to six weeks ago?

A. Four to six weeks ago.

Q. These were the papers you were working on?

A. Yes.

Q. And when these were finished——

A. I prepared a summary from those sheets.

Q. Yes.

A. And then these statements were prepared from the summary?

Q. On this first page of these working papers in the second division, "Allowances for exchange scales returned, total $18,554.45: cylinder $310.96, fan $18,343.49." Now, from what source did you get those three items?

A. Let me see those. (Witness examines working sheets.) I got those figures from the Exhibit No. 8 I think and from our previous working papers.

Q. Well, Exhibit No. 8 was one of those monthly statements, was it not?

A. Yearly statements.

Q. Or yearly statements?
A. Yes, sir.
1537 Q. And the other items you got from your working papers, is that right?
A. Yes.
Q. What working papers?
A. Papers that were used previously in this case.
Q. Papers that you had prepared down at Toledo?
A. I think based on Exhibit 40.
"Q. Based on Exhibit 40?
"A. Yes, sir, I think you will find $18,000——
"Q. Exhibit 40 is your report, is it not?
"A. Yes.
"Q. Were those working papers based on your report or was your report based on those papers?
"A. The Company's yearly statement was examined in conjunction with our previous figures.
"Q. Well, Exhibit 8 was a yearly statement. Now, here is Exhibit 8; now, I hand you Exhibit 8 in this case.
"A. I don't know the exhibits by numbers. This is 1911.
"Q. What exhibit is it you would like?
"A. The 1906 statement.
"Q. Is this the exhibit which you want (showing witness exhibit)?
"A. Yes, sir.
"Q. Now, on this working sheet——
"A. No, this is not the one. This is 1908, I want 1906.
"Q. I hand you Plaintiff's Exhibit No. 14 and ask you if that is the statement which you wish?
"A. Yes, sir.
"Q. Now, from Plaintiff's Exhibit No. 14 where did you take the item "Allowances on exchange scales returned, $18,554.45?"
"A. From the second page.
"Q. That item appears on the second page of Exhibit 14?
"A. Yes, sir.
"Q. Where did you obtain the item $210.96 cylinder scales?
"A. That is based on the net sales.
"Q. Based on the net sales, what do you mean by that?
"A. It is based on the total.
"Mr. Zane: He is asking about allowances, not charges, are you not?
"A. It is based on the net sales.

"Mr. Meads:

"Q. Well, you have taken from Exhibit 14 the item of $18,554.45 that we have found?
1538 "A. Yes, sir.
"Q. Now, the next item, $210.96, being allowances for exchange scales, is found where?
"A. It is based on the proportion of cylinder sales to net sales.
"Mr. Zane: Total net sales you mean?
"A. Total net sales.

"Mr. Meads: In other words, you took the amount of net sales of cylinder scales and the amount of net sales of fan scales and you approximated or you calculated the amount of allowances by taking the amounts, the total allowances, that portion of the total allowance which those two figures bear to each other?

"A. Based on the total net sales.

"Q. And that method of allowances you followed all the way through?

"A. Yes, sir.

"Q. You were at Toledo yourself how many months?

"A. I was there eight or nine months I think.

"Q. Eight or nine months?

"A. Yes, sir.

"Q. Did you while you were there make any attempt to allocate the allowances applicable to fan scales and to cylinder scales?

"A. I believe I made an attempt in the year 1911, but gave it up.

"Q. And after that it is a matter of approximation?

"A. A matter of approximation for all the years.

"Q. Yes, I mean after that whether it is all approximation.

"A. Yes.

"Q. Which covers the entire period?

"A. Yes.

"Mr. Zane: He examined on that for half a day once. I should think that would be enough.

"Mr. Meads:

"Q. The next item, "Cost of sales," what does that mean?

"A. It means the manufacturing cost.

"Q. Is that cost of scales?

"A. That's the total cost.

"Q. Manufacturing cost?

"A. Yes, sir.

"Q. Well, it is the manufacturing cost of scales, is it not?

1539 "A. Manufacturing cost of all scales.

"Q. Why did you call it "Cost of sales?" That appears in that way both in your account and in your working sheets; is that a mistake, should it be "Cost of scales?"

"A. This is the manufacturing cost of the whole of the business, of all the business of all the scales.

"Q. Well, is that word 'sales,' should that be 'scales?'

"A. That should be cost as it is stated, cost of sales, it is the cost of the whole business.

"Q. In your Exhibit 78 where the words 'Cost of sales' appear on the page following the first printed page what items are included in the words 'Cost of sales?'

"A. Labor and material.

"Q. Anything else?

"A. Packing.

"Mr. Zane: Give the general name for it. Factory overhead?

"A. Factory overhead.

"Mr. Meads: Your Honor please, I object.
"Mr. Zane: What's the use of wasting time?
"Mr. Meads: Well, I object to counsel——
"Mr. Zane: You know perfectly well what it is. What is the use of waiting here? The only difference between them is there were two items—the factory overhead and the original Exhibit 40—is that certain items were put in by Seatree in factory overhead such as insurance and taxes.

"Mr. Meads:

"Q. In the year 1909, if you will turn to Exhibit 78, being the cost of sales of fan scales as given by Price, Waterhouse & Company, $146,904.13, and as given by you, $157,614.58; now, will you just tell the court what items are included in that $157,614.58?
"A. It includes labor and material.
"Q. Labor and material, how much of the $157,000?
"A. $208,085.38.
"Q. Well, what is that?
"Mr. Zane: That's total.
"Mr. Meads: When you get through coaching him he can answer.
"Mr. Zane: I am not, I am telling you, you know what it means perfectly well.
"Mr. Meads: I do object, if your Honor please, to this continual suggestion to the witness of what he should answer.
1540 "Mr. Zane: It is not suggestions to the witness, but you don't let him finish. He stated the total and then you interrupted him. Let him tell what part of that total has gone into fans, you are interrupting him.
"Mr. Meads: I shall have to ask the Master to let this witness answer my questions. Now, after this interruption I think I am entitled to that direction from the court.
"Mr. Zane: But I think he should be allowed to finish it.
"Mr. Meads: But I didn't interrupt, it was counsel.
"The Witness: Factory overhead $78,093.39 which makes a total of $286,178.77, less adjustment of inventory and difference to agree with the books of $48,112.24, leaving a net of $238,066.53. The proportion of that charged against cylinder business is $80,125.86, fan business $157,614.58, second hand business $326.09.
"Q. Your figure of $208,085.38 where did you take that from?
"A. I took that from, I think from our Exhibit 40 in conjunction with the Plaintiff's Exhibit, yearly statement for that year.
"Q. What year, 1909, is that the statement which you refer to, I call your attention to Plaintiff's Exhibit No. 11?
"A. Yes, sir.
"Q. Now, will you please state the two sources from which you took this figure of $208,085.38 and point them out.
"A. Direct labor on Exhibit No. 11, Plaintiff's Exhibit No. 11, $118,202.91.
"Q. 118,—what?
"A. —202.91.

"Q. What is that item, in what exhibit?
"A. Direct labor.
"Q. Direct labor on all scales, is it not?
"A. Yes, sir.
"Q. Now, go ahead.
"A. Material.
"Q. Yes, from the same exhibit?
"A. Yes, there is an adjustment in this figure. The Plaintiff's Exhibit shows $94,001.06, but that should be adjusted to $89,882.47.
"Q. The material on Plaintiff's Exhibit No. 11 appears as $94,001.06, does it not?
"A. Yes, but those figures——
1541 "Q. Wait a minute. $94,001.06 which you say should be adjusted how?
"A. This figure is not correct. There was some adjustment on the books and these statements were not complete which I think has been testified to before.
"Q. Very well. What figure did you take?
"A. $89,882.47.
"Q. And shown where in any material you have before you?
"A. Yes, sir, on Plaintiff's Exhibit No. 40.
"Q. In Exhibit 40, what page?
"A. Page 2, for the year 1909.
"Q. That makse a total of how much?
"A. $208,085.38.
"Q. That is the amount of direct labor and material in all the scales, is it not?
"A. Yes, sir.
"Q. Now, when you got that figure on the amount of material and direct labor on all scales what did you next do?
"A. I got the factory overhead, the indirect figure.
"Q. From what source?
"A. I got that from Plaintiff's Exhibit No. 11 and from our statement, No. 40, with the adjustment of taxes and insurance.
"Q. And how much was your factory overhead after those adjustments?
"A. $78,093.39.
"Q. And then what did you do?
"A. Then I obtained the percentage to arrive at the cylinder figure and treated the balance as fan.
"Q. You didn't divide that cost on any basis of sales or any other method, did you?
"A. I divided according to instructions from Mr. Hall.
"Q. You divided on instructions from Mr. Hall?
"A. Yes, sir.
"Q. You found that all the material and labor that had gone into the scales amounted to $286,178.77, did you not?

"Mr. Zane: Labor and material?
"Mr. Meads: And factory overhead.
"A. Factory overhead, yes.

"Mr. Meads:

"Q. And then you assume that the cost of cylinder scales——
"A. Then after that of course was the adjustment of inventory.
"Q. Well, what do you mean by the adjustment of inven-
42 tory?
"A. The adjustment of inventory at the end of the year
hich brings down the figure to $238,066.53. I have given those
gures before.
"Q. Yes, you have testified to that. Now, that's the figure that
presents the total amount of material, labor and factory overhead
all the production of the company, is it not, after the adjustment
inventory?
"A. Yes, sir.
"Q. When you got that figure you multiplied the number of cyl-
der scales sold by some other figures, did you not?
"A. No, I took the labor and material on the basis of Zolg's testi-
ony.
"Q. You took the labor and material of what on the basis of Zolg's
stimony, did Zolg tell you anything about the labor and material
fan scales?
"A. I did these according to instructions from Mr. Hall, Mr. Hall
nstructed me how to do this.
"Q. All right, you just tell what Mr. Hall told you to do.
"A. Mr. Hall told me to take the figures as based by Mr. Zolg.
"Q. For what time?
"A. I think based on 1911.
"Q. 1911 and 1912?
"A. And 1912.
"Q. And you assumed under directions from Mr. Hall that the
ost of scales in 1909 was the same, did you?
"A. I used similar figures for the cost of labor and material.
"Q. When you say similar you mean the same figures, don't you?
"A. Of the same rate per scale.
"Q. Yes, the same rate per scale. Now, where did you get your
figures of the costs of cylinder scales for the year 1909 following that
method, what place did you take it from?
"A. I took the cost for the labor and material based on 1911 and
1912.
"Q. Yes, but that's the method you followed?
"A. Yes.
"Q. Following that method where did you get your total cost of
cylinder scales for the year 1909, from what paper, have you got it
there?
1543 "A. Well, it was based on Exhibit No. 40, on our Exhibit
No. 40. For the labor and material the same figure was used
but the overhead expense was adjusted slightly owing to the ad-
justment of taxes and insurance.
"Q. Yes, but what was the total cost of cylinder scales for the
year 1909 in these items that you have mentioned?
"A. The total cost was $80,125.86.

"Q. And that last item of $80,125.86 you took from where, from what paper, what page?

"A. I took the labor and material from page No. 1 for the year 1909, Exhibit No. 40, $58,260.

"Q. $58,260.64 which was arrived at by multiplying certain kinds of scales by certain estimated costs, was it not?

"A. Yes, sir.

"Q. And that figure is $58,260.64?

"A. Yes, sir.

"Q. Now, after you got that estimated cost, then what did you add to the $58,260.64 to make this $80,000?

"A. Added the overhead expense of $21,865.22.

"Q. Which you took from where?

"A. Which I took based on the figures with the adjustment of taxes from insurance of $3,907.75 which reduced the percentage from 36.10 to 37.53.

"Q. Your percentage of what?

"A. Of overhead expense, of combined labor and material.

"Q. In other words, this present account then does not follow your Exhibit 40 in the amount of overhead expense in the percentage, does it?

"A. No, sir, owing to the fact that we have adjusted certain items that Price, Waterhouse adjusted.

"Q. Yes, so that this account in that respect varies from the account which you have already submitted, does it not?

"A. It varies to that extent.

"Q. Well, it varies, in that particular item it varies from 36.10 to 35 and what per cent?

"A. To 37.53.

"Q. Yes, and when you charged in this Exhibit 78 as the cost of fan scales all the residue after you had made this approximation of the cost of cylinder scales as you have testified, is that right?

"A. Yes, sir.

"Q. Why did you take these figures of estimated costs of Mr. Zolg.

1544 "A. Because I was instructed by Mr. Hall to take them?

"Q. Did you ever yourself see the estimated cost book of the Toledo Company?

"A. No, sir.

"Q. Have you seen any other records which show the estimated cost of fan scales that correspond to these estimated costs of cylinder scales?

"A. No sir, I have seen no cost records at all, none whatever.

"Q. And the method which you followed in the preparation of this Exhibit 78, the working sheets of which are all in your handwriting, in the year 1919 was the method followed in 1906, 1907, 1908, 1900, 1911 and up to August 31, 1912, was it?

"A. Yes, sir.

"Q. Now, will you kindly turn to Exhibit 78 in the item of Commissions to Agents, you used the same working sheets for that item that you used in this on cost of sales or scales, did you not?

"A. Yes, sir.
"Q. On your first working sheet in line labeled Line 5, appears the entry of $154,734.45. Where did you get that figure?
"A. I got that from the yearly statement, the company's yearly statement, and also from our Exhibit No. 40.
"Q. That figure is the total commission that appears on the ledger of the Toledo Company?
"A. Yes, sir.
"Q. For that year, is it?
"A. Yes, sir.
"Q. The next item in that line is in the column marked "Cylinder," $1,759.29; from what place did you get that item?
"A. I got that from our Exhibit No. 40.
"Q. And the next item in the column "fan," is $152,975.16, is that correct?
"A. Yes, sir.
"Q. And you took that from your Exhibit 40, did you?
"A. No, sir, that was the balance of the commissions.
"Q. Your Exhibit 40 didn't have that item in it at all, did it?
"A. No, it only showed the item in total.

"Q. So your Exhibit 40 don't pretend anywhere within
1545 its covers to give the costs or commissions paid of Fan scales, does it?
"A. No, sir.
"Q. And in this item as well as all other items which you have where you attempt to give the cost of fan scales or the charge which should be borne by any fan scales, you have arrived at that result by treating the fan scale business as the residue of the business?
"A. Yes, sir.
"Q. I call your attention to page 1 of these working sheets, about three-fifths down the column to the words 'Based on percentage of total commissions to total net sales, 31.7330%, and pro-rated', those words are in your handwriting, are they?
"A. Yes, sir.
"Q. Just tell the court what you mean by that?
"A. That's the proportion or the percentage of the total commission to the total net sales and then the proportion of the cylinder business is based on the total net sales.
"Q Well, what does that word 'pro-rated' mean at the last?
"A. Well, it is pro-rated over the cylinder and fan business on that percentage.
"Q. In other words, you took the total commissions which were paid according to the ledger, is that it?
"A. Yes, sir.
"Q. And divided them between cylinder scales and fan scales in proportion to the amount of the net sales, is that what that entry means, that notation?
"A. Yes, sir.

"Mr. Zane: What year is this?
"A. 1906.
"Mr. Meads: 1906.

"Q. You were there when you started to make the allocation of commissions so as to determine what commissions were paid in each instance, were you not?

"A. Yes, sir.

"Q. How long had you been at Toledo when you started that?

"Mr. Zane: We object. This is not cross examination. That's all been gone over once, your Honor will remember.

"Mr. Meads: Why, I think it appears——

"Mr. Zane: Wait a minute. Your Honor will remember that when Mr. Slater was on the stand he produced the working
1546 sheets in regard to the original work done on commissions, and on those original sheets it appeared that a certain amount put down had a line drawn through it because it did not belong in that year and then after further cross examination it developed as to why they attempted to apportion commissions and their basis of so-called allocation was discontinued. At least half a day was spent on it before. We are just travelling over the same ground.

"The Master: The witness was cross examined on the work he did on the previous occasion. You seem now to be asking him about that same work.

"Mr. Meads: It appears I think here today, your Honor, for the first time on this question of commissions that they did abstract a certain portion, I think Mr. Hall said here for the year 1911 of these commissions, I think that appears in this case for the first time here today, and this witness now instead of following those in this statement has taken another statement, that appeared by Hall's testimony here today who stated Mr. Slater was in charge of it. Now, then I certainly ought to know why he abandoned accurate investigation for these approximations, and it appears hereby this witness today that these figures which he has given your Honor now are not figures which appeared in the original report, but I want to know and I think I have a right to know why he abandoned exact knowledge, such knowledge as he had for the year 1911, for this approximation. I don't recollect in this case where this witness has said——

"The Master: That's not what you are asking him. Read the question. I am only passing now on the question.

"(Question read.)

"The Master: Objection sustained.

"Mr. Meads:

"Q. When was that?

"Mr. Zane: We object for the same reason, it has all been gone over.

"The Master: It seems to me you have gone over that item.

"Mr. Zane: I don't think this witness has ever testified to that. The other day when we attemped to over this item of allowances counsel for the complainant objected because he said they stopped because Mr. Theobald objected to their getting the customer's name

and so they adopted another plan. This question of commission has arisen for the first time. It has been shown here by Mr. Hall today that they attempted and started to fix the commission
1547 exactly, then he puts a statement in here which does not agree with his former statement and wants your Honor to take it as an approximation without explaining why he didn't allocate them exactly.

"The Master: The question you are putting to the witness is when and how much time he spent on a previous occasion in Toledo.

"Mr. Meads: No, when it was that he started this very thing I am attempting to find out about, that is, this analysis of the commission account and the allocating of the specific commissions.

"The Master: Well, he may answer the question.

"A. I think it was in the early part of my visit to Toledo and I think it was the year 1906, not 1911.

"Mr. Meads:

"Q. 1906 that you attempted?

"A. I think so, yes, I am not sure, it is just from memory, it is a long time back now.

"Q. Do you remember how many sales there were in the year 1906 of fan scales?

"A. I can only tell you from this statement.

"Q. Well, if you can't tell without.

"A. Well, the net sales fan was $482,035.76.

"Q. How many cylinders?

"A. $5,554.

"Mr. Zane: We object. This is surely not cross examination.

"Mr. Meads:

"Q. How many different transactions of cylinders?

"Mr. Zane: We object to that, that's all been gone over. It is in Exhibit 40, that shows how many cylinders were sold, how many were charge backs, 57 sold, 2 charge backs, 55 net, that's all been gone over I want to say at least four times. It has nothing to do with what he is testifying.

"Mr. Meads: He has said he attempted to allocate them in 1906, if your Honor please. Now, I think we have a right to know what the witness did in his attempt to allocate this before the court is compelled to take this approximation. They have criticized us, Mr. Hall has on the stand, because we have assumed that in the year 1911 one condition obtaining that in other years the division of profit along the basis of 1911 was false. Now, here is a man who has approximated on this one thing alone all during the time when the information was right under his hand.

"Mr. Zane: If your Honor please, he was asked about the
1548 former years, what he had done in the way of taking those commissions. I can refer your Honor to the exact testimony. Your Honor will remember that his working sheets were produced,

there were erasures through certain commissions. The witness said it was found they didn't belong in that year, it had to go in some other year, and then he was asked how far he had carried that attempt at examination. The witness told him the years or parts of years that he attempted, and there were two years going along at the same time together; I remember the whole cross examination very well and the witness said why he abandoned it, all that was on cross examination, and he said that Mr. Hall told him to abandon it. Then Mr. Hall was put on the stand by us and he testified as to why he told him to abandon it. Now, that's all in the record. Mr. Meads absolutely forgets what he has examined about apparently. I can refer to the pages of the record, if it is necessary, to show that this whole subject has been gone over and does not belong here.

"The Master: What is your contention, Mr. Meads, as to your right to go back over that period that was gone over on a previous examination?

"Mr. Meads: I don't think I have a right, your Honor, to go directly over anything that we have gone over in a previous examination. If you will remember, Mr. Hall testified here on Saturday that he did not think that the method adopted by Mr. Seatree of making a detailed analysis for the year 1911 and then dividing the profits of the other years on the basis of the year 1911 was correct. Now, this witness today has testified that in the year 1906 they started an analysis of the commission account to determine exactly what the commissions were. I want to show by this witness where he obtained that and that each following year he made his division of the commission account on a pure assumption when the material was in his hands.

"Mr. Zane: Now, I have found where all this is found and that was the cross examination, and I will refer you to the volume of the testimony and to the page.

"(Discussion.)

"The Master: I will sustain the objection to the question put to this witness yesterday and that was pending last night when we took the recess. This witness testified fully on his previous ex-
1549 amination as to all that he did on the previous occasions when he was at Toledo, that's already in the case. This witness does not claim to have originated any theory in arriving at any conclusions, but claims to have worked on the plans laid down by and under the direction of Mr. Hall, who is, of course responsible for the theories upon which this witness has done the work.

"Mr. Meads: In this connection, however, I wish to call the court's attention to the fact that while Mr. Hall in these last exhibits which are offered said that he prepared them, the manual work was all done by Mr. Slater and he said that he checked the accuracy of these after Mr. Hall—or Mr. Slater said that he checked the accuracy of these statements.

"The Master: Yes, Mr. Slater simply collected such information and on such theories as Mr. Hall directed. If his theory of arriv-

g at commissions is wrong, why, that's a matter that Mr. Hall is sponsible for.

"Mr. Meads: Yes, but Mr. Slater has said he checked the correctss of these figures.

"The Master: Well, any question that goes to the correctness of e figures of course is competent, but that's not the question we had).

"Mr. Meads:

"Q. Mr. Slater, will you turn to Exhibit 79, what I would call e first page of the exhibit being the first typewritten page following the cover, there being a cover and then a blank sheet and then typewritten page, have you that?

"A. Yes, sir.

"Q. Turn to the entry, 'Inventory revaluation made by company fective December 31, 1908, but not credited at that date by company or by Price, Waterhouse & Company, $31,690.51', why did ou put into this statement the words 'at that date'?

"A. That was put on by Mr. Hall, sir.

"Q. Well, you know that that amount was credited on the next ay, do you not, on January 1st?

"A. Yes, sir, but——

"Q. Just a minute. It was credited on the books of the company n January 1, 1909, was it not?

"A. Yes, sir.

"Q. Now, do you know what that $31,690.51 was?

"A. It represents an increase in the valuation of the stock at December 31, 1908.

"Q. Of scales on hand, does it not?

"A. Yes, sir.

1550 "Q. And was entered on the books of the company on January 1, 1909?

"A. Yes, sir.

"Q. So you don't want to be understood as giving the impression that the books of the company do not show this entry, do you?

"The Master: He has answered that question.

"Mr. Meads: We will withdraw the question.

"Q. That entry was an arbitrary revaluation of scales on hand, was it not?

"A. I don't know, sir, whether it was an arbitrary valuation.

"Q. Well, don't you know from your examination of the books that it was merely an addition of eight and one-third per cent of the value of scales on hand, didn't your investigation give you that information?

"A. I know that's the term of the journal entry.

"Q. Well, will you tell the court from your examination of the books, you made the physical examination, did you not, yourself?

"A. Yes, sir.

"Q. Mr. Hall didn't, did he?

"A. No, sir.

"Q. From your physical examination of the books what your impression is of the entry in question?

"A. My impression is that it was an increase of the stock on hand.

"Q. An increase in the revaluation of the stock on hand, was it not?

"A. Eight and one-third per cent.

"Q. Yes. Do you know how much stock was on hand at the beginning of the accounting period in 1906?

"A. No, sir, I don't.

"Q. Well, assume for instance that some stock was on hand in 1906. Where are your working papers?

"A. I have not got those papers here.

"Q. Well, your recollection is sufficient, is it not, to show that they did have some stock on hand in 1906?

"A. Yes, sir.

"Q. Now, assume that some figure represented the value of the stock on hand in 1906 and that this was a revaluation of some stock on hand?

"Mr. Zane: In 1906?

"Mr. Meads:

"Q. In 1908, or the 1st of January, 1909. This revalua-
1551 tion consisted in eight and one-third per cent addition to the value of the stock on hand. The greatest difference that could be under any circumstances would be the difference between what was on hand on January 1, 1909, and what was on hand at the beginning of the accounting period in 1906, and that difference multiplied by eight and one-third per cent, would it not?

"A. I don't know, sir. I don't know what figure it was based upon.

"Q. You don't know what figure what was based upon?

"A. The eight and one-third. All that I saw was the entry on the books.

"Q. All you saw was the entry on the books. Did you see this copy of a memorandum that was put in this account?

"A. Yes, sir, I saw that, that was attached to the voucher.

"Q. Yes. Did that indicate to you that it was a revaluation of the scales on hand?

"A. Yes, it indicated that it was a revaluation of some scales.

"Q. What scales?

"A. Of course, I don't know the reason for the entry being made at that date.

"Q. If there had been one hundred thousand dollars' worth of scales on hand in 1906 and one hundred thousand dollars' worth on hand in 1909, exactly the same figure, this entry would have merely been an arbitrary addition to the profits of the business, a bookkeeping entry, would it not?

"Mr. Zane: We object as not cross examination.

"The Master: I think he may test the knowledge of the witness as to bookkeeping and accounting; objection overruled.

(Objection overruled.)

"A. It would if the $100,000 at the end of the latter period was a correct figure.

"Mr. Meads:

"Q. Yes, and you don't know from anything that you have before you how many scales were on hand in 1906 at the beginning of the accounting period, do you?
"A. No, sir.
"Q. You are sure that there were some on hand, are you not?
"A. Yes, sir.

"Mr. Meads: I think that's all with this witness.

1552 Redirect examination.

By Mr. Zane:

"Q. Mr. Slater, take the date, December 31, 1908, if that revaluation hand been on the books on the 31st day of December, 1908, what effect would it have had on the manufacturing cost for that year of 1908?
"A. It would have increased their profits.
"Q. Now, where it is as a matter of fact put on the books January 1st, 1909, without any corresponding entry December 31, 1908, what is its effect upon the profits of 1909, or not on the profits, on the manufacturing cost?
"A. Increases the profits for 1909, if it was on the books for 1909.
"Q. Yes, but here is the question.

"Mr. Meads: Just ask your question, don't tell the witness.
"Mr. Zane: Don't get worried.
"Mr. Meads: I have to get worried because you make this statement to this witness.

"Mr. Zane:

"Q. Was this entry on the books in 1908?
"A. No, sir.

"Mr. Meads: He has already testified three times it was not.

"Mr. Zane:

"Q. Now then, when you made up your manufacturing cost what was done, for a particular year, what was done with the inventory at the beginning of the year?
"A. Well, you start off with your inventory at the beginning of the year.

"Q. Well, you start, how do you start with it, as a credit or a debit, the inventory at the beginning of the year?
"A. A debit.
"Q. A debit?
"A. Yes.
"Q. Now, the inventory at the end of the year, is that in that manufacturing cost a debit or a credit?
"A. It is a credit.
"Q. Yes. If now, as a matter of fact, the revaluation had been put on the books at the end of 1908 as a credit, what would have been its effect upon the manufacturing cost for that year of 1908?
"A. It would reduce the cost.

"Mr. Zane: Yes. That's all.

1553 Recross-examination.

By Mr. Meads:

"Q. Well, now, Mr. Slater, if that revaluation had been put on the books at the end of 1907 instead of 1908, the thing would have balanced, would it not?
"A. The effect would have been the same as if being 1908.
"Q. Yes, and so back to 1906, the start of the accounting period?
"A. Yes.
"Q. If you had added to both sides of an account right back to the start, you would have a balance exactly where you had it before you added to both sides of your account, would you not?
"A. I don't understand.
"Q. If you had added to any account certain items on both sides of your account, your balance would have been the same no matter where you started?
"A. If you had the same figure.
"Q. Yes. So these scales in 1907 should have been revalued, or if they had been revalued, the manufacturing cost would have remained the same as it now is if the amounts on hand were the same, would it not?
"A. Yes.

Re-redirect examination.

By Mr. Zane:

"Q. If it were entered on both sides?
"A. Yes.
"Q. Yes, the trouble here is it is not entered except on one side?
"A. That is so, it is just entered on one side.

"Mr. Zane: That's all there is to it, it is a plain bookkeeping proposition.
"The Master: I believe you were through, Mr. Zane, were you?
"Mr. Zane: Yes.
"The Master: What is the next step, gentlemen?
"Mr. Zane: Now, we rest, your Honor.

1554 Tuesday, June 12, 1917.

WILLIAM ERNEST SEATREE, recalled as a witness on behalf of the Defendant, resumed the stand and testified as follows:

Direct examination.

By Mr. Meads:

"Q. Mr. Seatree, have you examined the transcript of the testimony of Mr. Hall in this case the last time he was on the stand?

"A. I have, yes, sir.

"Q. Directing your attention to that portion of his testimony and to an item of $23,885.34, as the cost of second-hand scales in which Mr. Hall expresses the opinion that your treatment of such an item was not correct, will you explain to the court the item of $23,885.34 and your treatment of it?

"A. As I understand it, in November, 1911, for the first time in the Company's history they took an inventory of exchange scales on hand, what I think they termed competitors' scales or competitive scales, one of the two. Those scales which had been taken back and accumulated had never been inventoried, so in November they inventoried them and took the credit to Surplus Account so that it would not affect the profits of that year 1911, and charged it to the Inventory account because from thence forward at the end of each year they continued to inventory; they inventoried them again at December 31, 1911, and consequently if they had not charged that $23,000 in the Inventory Account for 1911, seeing that they did inventory them at the end of the year, the profits for that year would have been overstated if they had not charged the $23,000 to the Inventory Account in 1911, and the entry was therefore necessary in order that the profits for the year 1911 might not be overstated.

"Q. In your opinion would the treatment of that amount as you treated it be an understatement of profits to the extent of $23,885.34?

"A. No; on the contrary, it was to prevent an overstatement of profits for the year 1811 except to the extent I might say that it might have varied between January 1st and the date it was taken in November.

"Q. That would be the only variation?

"A. Yes, sir, so far as the year 1911 was concerned.

1555 "Q. I call your attention to an entry as shown by Plaintiff's Exhibit 79 with a copy of a memorandum attached, "Inventory Revaluation made by company effective December 31, 1908, but not credited at that date by the company or Price, Waterhouse & Company. Scales Inventory $31,690.51. Profit and Loss $31,690.51.' Do you know what the entry in question is?

"A. Yes.

"Q. Have you investigated it?

"A. I have, yes.

"Q. Have you examined the original journal entries as well as the ledger entries of that item?

"A. Yes.

"Q. Just tell the court what that entry was and how you treated it?

"Mr. Zane: We object to his stating what the entry was, that entry will speak for itself. How he treated it we don't object.

"Mr. Meads: When I say what it was, I mean the nature of the entry; of course, the entry speaks for itself.

"Mr. Zane: We object to his stating it because it has not been introduced in evidence.

"Mr. Meads: Here is their statement, if your Honor please, which purports to give a transcript of the entry.

"Mr. Zane: Well——

"Mr. Meads: He is the last man in the world to object to this.

"Mr. Zane: He asked him about the entry on the book. If he wants to contradict this——

"Mr. Meads: I have the original journal entry if you want it.

"Mr. Zane: If you want to contradict it, well and good. But you can only do that by the entry itself.

"Mr. Meads: I am not contradicting it. I am asking what it was, what was the nature of the transaction, if your Honor please, it is to aid the court.

"The Master: Go ahead, Mr. Seatree.

"A. Up to and including December 31st, was it 1908 or 1909?

"Mr. Meads:

"Q. 1908.

"A. 1908, the company had followed a policy of inventorying its finished product at 25 per cent of list price and they closed their accounts for that year on that basis which was in keeping
1556 with the practice that had been followed prior to that time. They decided that from that time forward they would inventory at 33⅓ per cent of list. In other words, they increased the valuation to the equivalent of eight and one-third per cent of list, and for each year after that they inventoried on that basis, consequently, in order that the year 1909 following the date of this entry might not show a fictitious profit in that the inventory of December 31, 1909, was at this higher price, they adjusted the books after the first inventory as of December 31, 1908, or January 1, 1909, by taking this increased valuation which they thereupon credited to surplus so it would not affect the profits of either 1908 or 1909 improperly. As a matter of fact, the cost of those goods was probably nearer twenty-five per cent of list than thirty-three and one-third.

"Mr. Zane: We object to his statement and move to strike it out.

"Mr. Meads:

"Q. How do you know that?
"A. By taking the percentage of the actual cost, approximating it for the different years to the selling value.
"Mr. Zane: We object.

"Mr. Meads:

"Q. Did you do that?

"Mr. Zane: We object, because he has already stated he didn't know anything about the actual cost.
"Mr. Meads: On the contrary, he has done it.

"Q. Did you do that, Mr. Seatree?
"A. I did that.
"Q. Yourself?
"A. Yes, sir.
"Q. And what did you ascertain such cost to be?
"A. At the average, taking all scales——

"Mr. Zane: We object as not rebuttal. They have gone into this once, what he is trying to testify to now in an examination as to cost, that has been testified to heretofore, it bears upon the cost figures they have already given in their account.
"Mr. Meads: Not at all, it is explaining this one item.
"The Master: It is not for that purpose as I understand it.
"Mr. Meads: Not at all, it is to explain this entry and nothing else.
"Mr. Zane: We take an exception.
"The Master: Go ahead.
"A. Taking the cylinder and fan scales together, the approximate cost as I arrived at it, according to my original calculations, was in the neighborhood of twenty-five per cent.

1557 It fluctuated a little as between one year and another, but as a matter of fact the cost was below thirty-three and one-third per cent in each case and this entry was just to adopt a new, a higher basis of inventory valuation, and inasmuch as they changed the percentage and was adopting that from that day forward, and took their inventory each year on the higher value, it was obviously necessary to raise the inventory at the beginning of the year 1909, otherwise the profits for the year 1909 would be overstated, and they made the entry after they had determined their profits for the year 1908, which was the proper way to do it because the inventory at the beginning of 1908 was valued on the lower basis and they closed the books on that basis, and then for the next year they raised the value for the end of that year and took the surplus or credit resulting from the revaluation to surplus which was the proper place to take it, otherwise it would have improperly inflated the profits of every item of those profits.

"Mr. Meads:

"Q. What was the effect of treating it as treated by Marwick, Mitchell, Peat & Company?

"A. The effect was to overstate the profits by the extent of that increased valuation.

"Q. Which was of substantially what?

"A. I think it was around $31,000.

"Q. Adverting to another item which was testified to by Mr. Slater and Mr. Hall, the three per cent which you took upon gross business instead of net business for losses on agents' accounts, why did you take that on gross business instead of net bu-iness?

"Mr. Zane: We object. He has testified to that once.

"The Master: It seems to me you went into that and Mr. Hall's testimony was simply in rebuttal of the testimony you had before given.

"Mr. Meads: I don't think, if the court please, we did, that is, he merely said here when on the stand before, he merely said he took it at three per cent on gross instead of three per cent net, but why he did it on gross rather than net I don't think the witness has gone into.

"Mr. Zane: I beg your pardon. He has testified to it, he stated both upon his direct and upon his cross that the reason he took three per cent upon the gross for the year 1911 was because he looked into certain accounts and inquired in regard to them, and he thought three per cent on gross would be proper.

1558 "Mr. Meads: Then if he said that, he wishes to make a correction, if that is a correct statement of what the witness says, he wishes to make a correction.

"The Master: Mr. Seatree, did you testify on this subject before?

"A. I testified to this effect, that I ascertained——

"Mr. Zane: We object to what he testified before.

"The Master: Well——

"The Witness: I didn't testify on this particular point, Mr. Morrisson, if you please, I testified that the amount I arrived at was equivalent to three per cent of the gross sales, and I used three per cent of the gross sales.

"The Master: Didn't you give your theory or reason for reckoning it on the gross sales rather than on the net sales?

"A. I did as regards expenses generally, but I don't think as regards the particular losses on agents' accounts.

"The Master: It may be that this was on expenses generally. I am quite sure that he did testify.

"Mr. Meads: It was expenses generally. He has not gone into this and it is so short; your Honor, I am confining Mr. Seatree entirely to these three points which were brought up on the very last day by these gentlemen.

"Mr. Zane: Yes, but they want to go back into their case now.

(Discussion.)

"The Master: I will overrule the objection.

"Mr. Meads:

"Q. Will you explain your treatment?

"A. I used the amount of the losses that I arrived at as appertaining to this accounting period as a sum which happened to be three per cent of the gross sales, but the theory of using gross sales for the division as between cylinder scales and fan scales was the point I wanted to explain now, and that was that in my opinion the gross sales were a better measure of the approximation of those losses as between cylinder and fan scale business than the net sales for the reason that the money was advanced to the agents to obtain sales, to obtain the gross business, and as a matter of fact it had no relation to whether the accounts stayed placed or not, they were not bad debts on customers' accounts, they were bad debts on advances to agents, the money being expended to get the gross sales, and whether the scale ultimately came back or it didn't come back didn't affect that measurement of apportionment at all because it was on an agent's account and not a customer's account.

1559 "Q. You say, Mr. Seatree, that the amount which you discovered of such losses was equivalent to three per cent?

"A. It was.

"Q. In other words, did you arrive at that amount by taking three per cent or you found the amount first and discovered it was three per cent?

"Mr. Zane: We object as leading.

"The Master: Objection sustained.

"Mr. Meads:

"Q. Just expain to the court the method which you followed in determining this three per cent?

"A. I ascertained what the losses on the Agents' accounts were during the accounting period, and I arrived at a sum of money, and then I found what percentage it was of the gross sales and it happened to be three per cent of the gross sales.

"Mr. Meads: That's all.

Cross-examination.

By Mr. Zane:

"Q. You ascertained those losses for the year 1911?

"A. My recollection is that I ascertained what the losses were for the larger period.

"Q. Didn't you when you were on the stand before say that you ascertained the losses for 1911 and figured the other years on that basis?

"A. I said that I traced the losses——

"Q. Answer that yes or no.

"A. I could not from my memory.
"Mr. Meads: Finish your answer, Mr. Seatree.

"Mr. Zane:

"Q. You can't remember what you did testify?

"A. I could not say now without referring to my testimony.
"Q. Who did ascertain that figure, you or Bowman?
"A. I think I was principally instrumental in determining that.
"Q. Did you hear Mr. Bowman testify as to how he ascertained the figure?
"A. He was working with me, but I was in charge.
"Q. Do you remember?
"A. I don't remember whether he testified to that or not.
"Q. Now, you say that the finished product always after 1909 was valued at thirty-three and one-third per cent of list?
"A. I won't say it was every time, but it was at that time, and it was at December, 1911.
1560 "Q. Why, you know very well that it was not in December, 1910, don't you?
"A. I think at that particular date, December, 1910, I think it was slightly varied, some of it was thirty-three and one-third of list and I think some of it was twenty-five.
"Q. So you were in error when you said that after this the finished product was always carried at thirty-three and one-third per cent, were you not?
"A. Technically possibly, I was; what I meant to say was that it was at the end of the accounting period, it was valued at thirty-three and one-third.
"Q. What do you call the end of the accounting period?
"A. At August, 1912.
"Q. End of August, 1912?
"A. From December 31, 1911, it was carried at thirty-three and one-third and I understand it was carried at thirty-three and one-third at August, 1912, also; so that the intervening dates would not have any significance.
"Q. Now, you have already testified as to how you arrived at cylinder cost and fan cost in the year 1911, have you not?
"A. Yes.
"Q. You don't wish to vary your former testimony?
"A. Not as regards the two times respectively or together either.
"Q. In no respect?
"A. No.
"Q. Now, you have said that your treatment of the inventory of November 23, 1911, was to prevent an over-statement of profits in the year 1911?
"A. I have, yes, sir.
"Q. And you confine yourself to 1911?
"A. Yes, sir, so far as that entry is concerned, yes.

"Mr. Zane: That's all.
"Mr. Meads: I think that's all."

Mr. Zane: We now present in pursuance of our offer heretofore made the certified record from the district Court of the Southern District of New York in the case heretofore mentioned consisting of the bill of complaint, the answer, the amendments to the answer, the replication, the opinion of the court on the merits, the decree of the court dismissing the case and the decree of the court entered
1561 upon the receipt of the mandate of the Circuit Court of Appeals, affirming the decision of the lower court.

Mr. Meads: To which offer and to each of the instruments mentioned in such offer the defendant objects on the ground that they are irrelevant and immaterial, and further objects that they cannot be offered as matters adjudicated or heretofore in issue between the parties to this suit, because the parties to the suit in the exhibits sought to be offered are different from the parties in the suit at bar; to that portion of the offer which includes the opinion of the court I make specially further objection that the matters sought to be shown by such opinion are properly shown by the decree and the opinion has no place in such an offer.

The Master: Objection overruled.

(Said certified copies from District Court of Southern District of New York in case of Computing Scale Company and Jonathan B. Hayward vs. Toledo Computing Scale Company, consisting of bill, answer and amendments thereto, replication, opinion, decree of dismissal, and decree affirming decision of lower court, received in evidence and marked Plaintiff's Exhibit 74.)

Mr. Zane: Now, we rest, your Honor.

Mr. Zane: Four Exhibits of the plaintiff, Nos. 77, 78, 79 and 80, by oversight were not offered at the time they were examined about and we ask leave to offer them now and have them admitted.

Mr. Meads: To the introduction of each of which instruments the defendant objects as incompetent, irrelevant and immaterial, and for the further reason that such instruments are based on matter has never been offered in evidence in this case and has never been before the court or before counsel for inspection.

The Master: Objection overruled.

(Statements heretofore marked for identification Plaintiff's Exhibits 77, 78, 79 and 80, so offered, received in evidence and marked "Admitted.")

The Master: That closes the evidence, gentlemen, as I understand it?

Mr. Zane: Yes.

Mr. Meads: Yes.

Tuesday, March 19, 1918.

Mr. Meads, counsel for defendant, presented to the Master
1562 a notice with proof of service on counsel for plaintiff, with his own affidavit attached, and entered a motion to reopen the case to take testimony on the question of the number of fan scales manufactured for the year 1905 and an average manufactur-

ing cost per scale. The motion was argued by counsel and overruled by the Master. The notice and affidavit at-ached have been marked as "Exhibit Affidavit on Motion to Reopen."

To Messrs. Zane, Morse & McKinney, Solicitors for Complainant:

You are hereby notified that on Tuesday, March 19, 1918 at ten A. M., or as soon thereafter as the matter can be heard before the Honorable C. B. Morrison, Master in Chancery, we shall move to reopen the taking of testimony in said cause for the purpose of taking the depositions of F. S. Johnson and E. Rouse and in support of such motion, shall read the affidavit hereto attached.

ALBERT H. MEADS, being first duly sworn, deposes and says that he is one of the solicitors for the defendant in the above entitled cause, and that upon receipt of the Draft of Master's Report herein on February 26, 1918, he immediately read the draft of such report, and sent a copy of such report to his client, Toledo Computing Scale Company, at Toledo, Ohio, with instructions to verify the figures of such report, in order that errors in such report, if any, might be objected to by proper objections filed with the Master in said cause.

That in and by said report, the cost of labor and material of cylinder scales for the accounting period has been obtained by multiplying the number of such scales sold by the cost per scale of such scales for the period from March 8, 1911 to August 31, 1912, by assuming an average price per scale arrived at by dividing the total direct cost of labor and material by the total number of scales shown in defendant's account, and that such a method of arriving at the manufacturing cost for the entire period, is unfair to the said defendant, and results in a disproportionate charge to fan scales manufactured by said defendant during the accounting period for such item of manufacturing cost.

Affiant further states that the last year in which fan scales
1563 were solely manufactured by the defendant was the year 1905, and that the amount of direct labor and material in such fan scales is already shown by the record in said cause, but that the number of fan scales built in the year 1905 is not shown by the record in such cause.

Affiant further states that if evidence of the number of fan scales so built in the year 1905 was adduced, it would be possible for the Master to determine exactly the cost of fan scales in the year 1905, and inasmuch as the Master has found that the cost of labor and material did not vary materially during the accounting period, it would be possible for the Master, with this slight additional testimony, to determine what amount should be charged to fan scales for the manufacturing cost during the accounting period, and thus to determine accurately the amount chargeable for the manufacturing cost to cylinder scales during such accounting period.

Affiant further states that he did not discover that the number of such fan scales for the year 1905 had not been shown in the record until March 11, 1918, at which time he immediately made diligent

fort to ascertain the names of the witnesses by whom this number ould be proven, and that he did, on March 15, 1918, find that the umber of such fan scales built during the year 1905 could be roven by F. S. Johnson and E. Rouse and that the taking of the stimony of such witnesses would not consume more than two hours' me, and that by such witnesses he can show that the number of an scales manufactured in the year 1905 was seven thousand and hirty-nine (7,039) and that the average cost per fan scale for the irect labor and material during said year was the sum of Thirteen Dollars and Eighty Cents ($13.80).

Affiant further states that the application for the taking of this estimony is not for the purpose of delay, and that if the Master will reopen such cause for the purpose of taking such testimony, he will take the same by any short day to be fixed by the court.

And on to wit: the 6th day of May, 1918, there was filed in the Clerk's office of said Court a certain Report of Charles B. Morrison, Master in Chancery, in words and figures following, to wit:

1564

Filed May 6, 1918.

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. 30021.

THE COMPUTING SCALE COMPANY

vs.

TOLEDO COMPUTING SCALE COMPANY.

To the Honorable the Judges of said Court:

The undersigned, Charles B. Morrison, Master in Chancery of said Court, respectfully represents unto your Honors that on the 6th day of May, 1914, the above entitled suit was referred to him with directions that he ascertain the gains and profits made by the defendant and the amount of damages sustained by the plaintiff by reason of the infringement by the defendant of Reissued Letters Patent No. 11,536 and report his conclusions of fact and of law to the Court.

Pursuant to the order of reference, the parties by their respective attorneys appeared before the undersigned on the 26th day of May, 1914, and on divers days thereafter until the 12th day of June, 1917, at which time the taking of testimony was closed. On July 2, 1917, arguments were begun before the Master and thereafter briefs of fact and law were submitted and further arguments were made and concluded on November 20, 1917, and the case taken under advisement. While the case was on hearing the parties introduced certain oral and documentary evidence and certain physical exhibits and took other necessary steps and proceedings, all of which will more fully and at large appear by the transcript of the testimony

and proceedings had and taken before the undersigned and herewith returned into court.

By agreement of the parties testimony was taken before the undersigned at Toledo, Ohio, where the books and records of the Toledo Scale Company were kept, on four different occasions. The remainder of the testimony was taken at Chicago except that certain depositions were taken outside of Chicago that were offered but not admitted in evidence.

1565 *Findings of Fact.*

1.

Description of the Parties and the Business of the Toledo Scale Company.

The plaintiff, Computing Scale Company, the owner of Reissued Letters Patent No. 11,536, the patent in suit, is a corporation engaged in the business of manufacturing and selling computing scales under said re-issued patent at Dayton, Ohio, and is sometimes referred to as the Dayton Company.

The defendant, Toledo Computing Scale Company, now the Toledo Scale Company, hereinafter called the Toledo Company, is a corporation engaged in the business of manufacturing and selling computing scales at Toledo, Ohio, and in the course of its business infringed Claims 5 and 6 of the patent in suit, as held by the Circuit Court of Appeals of this circuit in Toledo Computing Scale Company v. Computing Scale Company, reported in 208 Fed. 410.

The infringing or accounting period begins about the 1st day of October, 1906, when the defendant began making and selling the infringing scale, and ends on the 3rd day of September, 1912, when the patent expired.

When the Toledo Company began to manufacture and sell infringing scales, hereinafter called cylinder scales, it was conducting a large, well established business in manufacturing and selling computing pendulum fan scales. The fan scale shows weight and value by means of an indicator index-hand carrying prices per pound moving back and forth across a fan shaped dial, carrying on its face value and weight graduations. At this time defendant had its factory at Toledo and a built-up organization for making and selling fan scales, and after it began to make and sell the infringing scale it continued in the same factory under the same organization to manufacture and sell both fan and cylinder scales.

The fan scale and cylinder scale business were carried on as a single business. The material used in manufacture of fan scales and cylinder scales was drawn from the same stock. The same men worked on both kinds of scales. The same salesmen sold both kinds of scales. The overhead expenses applied to both kinds of scales.

1566 The books of account and records of the company were not kept with a view to separate costs, expense or profits as between the two kinds of scales made and sold. Obviously the cost of

making and selling cylinder scales cannot be accurately determined, but by making use of percentages and apportionments costs and profits may be found with reasonable certainty.

Salesmen of the Toledo Company in making sales sometimes accepted second-hand scales from customers in part payment of the purchase price on sales of cylinder scales. Until in 1909 these allowances were carried in one account as "Exchange Scales." From the beginning of 1909 there were two accounts, "Toledo Scale Allowances" and "Exchange Scales." Toledo Scale Allowances were scales of defendant's own make taken in part payment in exchange. Exchange Scales were scales of other makes taken in part payment in exchange. The plaintiff claims that in this accounting the defendant should be charged the full selling price of cylinder scales regardless of the fact that a portion of that price might have been paid by another scale taken in exchange. This claim has not been accepted.

The scales taken in as part payment were not all handled in the same manner. Some were destroyed entirely, others were fixed up and sold as second-hand scales, and the account stated in this report includes second-hand scales, as well as new scales, and the profit or loss on second-hand scales has been treated the same as profit or loss on new cylinder scales.

In addition to allowances for exchange scales, special allowances, or deductions from the purchase price, were made for one reason or another. It might be on account of marring or to place a scale in some advantageous place or otherwise.

After a scale was sold and the sale entered on the books as a credit to the new sales account it might happen that the scale would never be delivered, or it might be repossessed by the Toledo Company for failure to pay an installment or for some other reason. For such transactions prior to 1909 there was one account on the defendant's books and it was in the form of debits to sales. During the year 1909 a new account was opened called "Chargebacks" but the old method of debiting sales also continued in force to some extent. Both accounts are called chargebacks by the witnesses testifying on that subject. These chargebacks reduced the credits to sales to the extent of such chargebacks and the purchaser in such case forfeited whatever payments or installments he had made on the scale.

1567 The repossessed scale was refinished or rebuilt and sold over again as a new scale and was handled the same as if it had not been the subject of a previous sale.

Resident salesmen and travelling salesmen sold defendant's scales. In some large cities the defendant maintained branch offices with resident salesmen; outside of such large cities scales were sold by travelling salesmen.

Salesmen of the Toledo Company received a commission on sales made by them as compensation for their services. In making sales agents were permitted to make an allowance of a stated amount on certain scales taken in part payment for new scales, but the salesman did not receive any commission on the amount so allowed for the exchange scale. Agents sometimes allowed a greater amount for an

exchange scale than was permitted by the company and sometimes made other allowances to the purchaser. Such excess allowance the agent had to stand and the amount was charged against commissions in the Commission Account and was credited to the customer in his account.

The chargebacks, allowances and commissions above mentioned are an important element in the account to be stated and the manner of handling them has been a matter of controversy between the parties to this suit.

Before the taking of testimony began, on motion of the plaintiff, the Master entered an order directing the defendant to prepare and file with the Master an account in accordance with federal equity rule 63, specifying the information that such account should contain. Trans. 4.

On January 15, 1915, the defendant filed an account prepared and certified to as correct by William A. Zolg, Auditor of the Toledo Company, hereinafter called defendant's account. Plaintiff objected to the account and moved for an order on defendant to make a further account in compliance with the Master's order. After some discussion it was agreed that Zolg should be produced before the Master for oral examination, and Zolg and other employes of defendant were afterwards produced and examined at Toledo where the books and records were, and the motion was not again called to the Master's attention.

Defendant's account covers only the period from March 8, 1911, to August 31, 1912, March 8, 1911 being *being* the day on which the defendant began to manufacture scales with aluminum spiders. The spider in a cylinder scale is the framework inside of the cylinder.

Zolg did not include in defendant's account business done
1568 prior to March 8, 1911, because he was directed by counsel for the defendant not to do so. Counsel for the defendant took the position that the defendant was not bound to account for scales not containing the aluminum spider although Zolg in defendant's account for the period covered therein included scales with steel spiders as well as scales with aluminum spiders.

The defendant's account, covering as it does but a fraction of the accounting period, does not furnish a basis for stating the account for the entire period, but the account furnishes useful information that has been used by other accountants who followed Zolg.

Marwick, Mitchell, Peat & Company, chartered accountants, of the City of Chicago, on plaintiff's behalf examined the books of account and records of the Toledo Company at Toledo and submitted, a report, introduced in evidence as Plaintiff's Exhibit 40. The report is elaborate and purports to show the profits made on cylinder scales during the accounting period. Mr. Hall, a member of the firm of Marwick-Mitchell, who directed the work, and others who examined the books and obtained the figures used in the report testified as witnesses in the case.

After the plaintiff had closed its case in chief, Price, Waterhouse & Company, public accountants of the City of Chicago, on behalf of the defendant examined the books and records of the Toledo Com-

pany at Toledo and the report made by Marwick-Mitchell, together with the working papers used by Marwick, Mitchell in making their report. Price-Waterhouse prepared reports, introduced in evidence as Defendant's Exhibits 21, 22, 23, 26 and 27, and later along Defendant's Exhibit 61 was introduced. Price-Waterhouse did not prepare a report from the books showing the necessary information to construct a complete account of the business. They took the report of Marwick-Mitchell, Plaintiff's Exhibit 40, as a basis and made such additions to and deductions from the figures in that exhibit as they claimed the books and records of the defendant required. Defendant's accounts in Exhibits 21, 22, 23, 26 and 27 deal with the accounts for the year 1911 only, and, having obtained the figures for that year, use those figures as a basis of apportionment to arrive at the results of the business for the years 1906, 1907, 1908, 1909, 1910, 1911 and eight months of 1912 as shown by Defendant's Exhibit 61, covering the entire accounting period.

Price-Waterhouse attempted to reform the books of the Toledo Company as to the year 1911 and the calculations made by
1569 them and the results given are not based on the figures as they were entered on the books of the Toledo Company, but from figures that in their opinion should have been entered, that is, in many cases they disregarded the theory upon which the books were kept by the Toledo Company and substituted theories which they regarded as better. Defendant's Exhibits 21, 22, 23, 26 and 27 are based on such reformed accounts. Defendant's Exhibit 61 is made for the purpose of applying the results of the year 1911 as disclosed in Defendant's Exhibits 21, 22, 23, 26 and 27 to the business done in the other years of the accounting period. However, the figures shown in these exhibits were practically all abandoned on the hearing before the Master and the figures disclosed in Plaintiff's Exhibit 40, as changed and corrected on the hearing, were in the main acquiesced in by the Toledo Company and have formed the basis of the account as herein stated.

After defendant's exhibits were introduced Marwick-Mitchell prepared four additional reports, introduced in evidence as Plaintiff's Exhibits 77, 78, 79 and 80. Exhibits 77, 78 and 79 are statements comparing the figures obtained by Marwick-Mitchell for the plaintiff and Price-Waterhouse for defendant. Exhibit 80 is a statement of experimental, litigation and patent expenses that plaintiff claims should not be credited to the Toledo Company in this account.

The Toledo Company sold scales all over the United States, in Canada and other foreign countries. The scales sold in foreign countries other than Canada were manufactured at Toledo and sold from Toledo and shipments were made from Toledo to the purchasers. The defendant does not dispute the right of the plaintiff to the profits made on these scales and they have been treated in this report in all respects the same as domestic sales.

Gross and Net Sales of Cylinders and Fans and Per Cent Each Bears to Total Sales.

The gross sales of new cylinder and fan scales during the accounting period, exclusive of Canadian sales, are shown in the table that here follows, marked "A":

1570 *"Table A."*

	Cylinder scales.	Fan scales.
1906	5,760.00	520,925.00
1907	154,758.00	456,924.30
1908	459,372.50	444,345.81
1909	605,466.41	615,479.33
1910	789,358.11	523,625.78
1911	803,608.01	513,869.71
1912 (8 mo.)	516,216.61	353,144.09

From these gross sales there must be deducted what are termed chargebacks. When a scale was sold that did not stay sold or for some reason was never delivered or was repossessed after delivery by the Toledo Company, a credit was made in the proper amount on the books, charging back the purchase price or the unpaid portion thereof. The following table "B" shows the net sales of new cylinder and fan scales, exclusive of Canadian sales, after deducting chargebacks. There is no dispute as to the figures used in Tables A and B.

"Table B."

	Cylinder scales.		Fan scales.	
1906	55 scales at	5,444.00	5,360 scales at	482,065.76
1907	1,159 " "	147,836.00	4,679 " "	420,842.84
1908	3,052 " "	437,076.75	4,581 " "	409,001.14
1909	3,929 " "	556,108.08	7,733 " "	583,572.67
1910	5,060 " "	722,625.76	6,615 " "	492,704.53
1911	4,675 " "	725,622.14	7,652 " "	475,770.27
1912 (8 mo.)	2,894 " "	469,031.71	4,768 " "	329,244.01

To arrive at conclusions as to credits and deductions hereafter to be made it is necessary to ascertain the per cent that the gross sales and also the net sales of new cylinder and fan scales bear to total sales. The following table "C" shows the gross per cents and the following table "D" shows the net per cents:

"Table C."

	Cylinder scales.	Fan scales.
1906	1.09% of total gross	98.91% of total gross
1907	25.30% " " "	74.70% " " "
1908	50.83% " " "	49.17% " " "
1909	49.58% " " "	50.42% " " "
1910	60.11% " " "	39.89% " " "
1911	60.99% " " "	39.01% " " "
1912 (8 mo.)	59.36% " " "	40.64% " " "

1571

"Table D."

	Cylinder scales.	Fan scales
1906	1.14% of total net	98.86% of total net
1907	26.00% " " "	74.00% " " "
1908	51.66% " " "	48.34% " " "
1909	48.80% " " "	51.20% " " "
1910	59.46% " " "	40.54% " " "
1911	60.40% " " "	39.60% " " "
1912 (8 mo.)	58.76% " " "	41.24% " " "

To obtain the gross business, excluding Canadian, the second-hand scale sales must be added. The following table "E" shows the gross cylinder sales, gross fan sales, gross second-hand sales and the total gross sales:

"Table E."

	Cylinders.	Fans.	Second-hands.	Total.
1906	5,760.00	520,925.00	.....	526,685.00
1907	154,758.00	456,924.30	850.00	612,532.30
1908	459,372.50	444,345.81	21,647.10	925,365.41
1909	605,466.41	615,479.33	48,345.70	1,269,291.44
1910	789,358.11	523,625.78	92,107.79	1,405,091.68
1911	803,608.01	513,869.71	94,820.35	1,412,298.07
1912 (8 mo.)	516,216.61	353,144.09	95,170.80	964,531.50

Hereafter in the report the different cost figures will contain expenses of second-hand scales and therefore cylinder scales should receive credit for a part of the second-hand sales. The following table "F" shows the net sales of second-hand scales and the part thereof to be added to cylinder sales, apportioned on the percentage that net sales of new cylinder scales bear to total net sales of new scales:

"Table F."

1906	No second-hand sales.					
1907	26.00%	of	$850.00	second-hand	sales	$221.00
1908	51.66%	of	21,647.10	"	"	11,182.89
1909	48.80%	of	48,345.70	"	"	23,592.70
1910	59.46%	of	92,107.79	"	"	54,767.29
1911	58.76%	of	85,872.30	"	"	50,458.56
1912 (8 mo.)	60.40%	of	94,820.35	"	"	57,271.49

Manufacturing and Selling Expenses and Other Deductions.

Manufacturing Cost:

The defendant kept no cost sheets or cost records during the accounting period and to arrive at costs reliance must be placed on the cost figures given in the defendant's account filed herein pursuant to an order of the Master directing the defendant to file an account in compliance with Federal Equity Rule 63.

The account was prepared by Mr. Zolg, Auditor of the To-
1572 ledo Company, and covers the last ten months of 1911 and the first eight months of 1912. The information upon which Mr. Zolg bases his cost figures was obtained by him during the many years he was in charge of the accounting department and from reports and information procured by him as to labor and material costs from the factory auditing department and from books, records and sources available to him. His connection with the Toledo Company renders it practically certain that the cost figures furnished by him are not unfair to that company and such cost figures have been accepted and relied upon by the plaintiff and have been adopted in this report as the safest method of obtaining the manufacturing cost. The method used by Zolg in making the account as to overhead expenses has been approved and used by the accountants on both sides of the case. While the defendant's account covers only the period above mentioned, the cost of labor and material did not vary materially during the accounting period and it is therefore safe to apply Zolg's costs for 1911 and 1912 to the remainder of the period.

To obtain the cost of direct labor and material the net number of scales sold in each year has been multiplied by the cost figures given in defendant's account for the different styles of scales sold during the year. In cases where no cost was given for a particular style number of scale the cost figure used was the figure that the evidence showed applied to the scale nearest to it in cost for which a cost figure was furnished and which was substantially the same, Plaintiff's Exhibit 40. The net sales rather than the gross sales are used because repossessed scales were sold over again as new scales and took a manufacturing cost when resold, and if the gross sales are taken, repossessed scales would receive a double manufacturing cost.

Having obtained in this way the cost of direct labor and material of cylinder scales, it is necessary to find the factory overhead of cylinder scales. The factory overhead that went into manufacturing cost is found in the following accounts on the defendant's books: Indirect Labor, Factory Supplies, Experimental, Tools and Patterns, Packing and Shipping, Lumber, Trucking, Maintenance, Repairs and Alterations, Power, Heating and Light, Superintendent and Factory Office, Miscellaneous Factory Expense and Refinishing Expense. The total direct labor and material for fans and cylinders and the total factory overhead for fans and cylinders are given on the books of the Toledo Company and are not disputed.

573 Following the method used in defendant's account and by the accountants on both sides of the case, the total direct labor nd material for fans and cylinders should be divided into total ctory overhead for fans and cylinders and it will be found that e total factory overhead for each year is a certain per cent of total bor and material for each year, and on the theory that factory erhead for cylinder scales will bear the same ratio to direct labor nd material for cylinders that total factory overhead for fans and ylinders bears to total direct labor and material for fans and cylin-ers, the per cent figure so obtained should be used to find the fac-ory overhead apportionable to cylinder scales.

The following table "G" shows the direct labor and material and actory overhead applicable to cylinder scales ascertained as above tated:

"Table G."

	Direct labor and material.	Factory overhead.	Total manufacturing cost.
1906	$817.30	$403.91	$1,221.21
1907	17,203.93	7,425.22	24,629.15
1908	45,187.17	18,612.60	63,799.77
1909	58,260.64	21,032.09	79,292.73
1910	76,457.55	48,130.03	124,587.58
1911	74,151.95	59,447.52	133,599.57
1912 (8 mo.)	46,157.98	33,556.85	79,714.83

In the manufacturing costs given above in each year there has been apportioned to and included in cylinder cost of manufacture a portion of the expenses shown in an account carried on the books of the Toledo Company called the Experimental Account. This is an account of the expenses of the Toledo Company's invention depart-ment. The evidence does not show the nature and character of the items of this account, nor does it show that any of the expenses in this account were incurred on account of cylinder scales or had anything to do with cylinder scales. One De Vilbiss, an inventor, was employed by the Toledo Company and was for several years at the head of this department. What De Vilbiss did and what others under him or connected with that department may have done or what the moneys charged as expenses were paid out for is not shown by the evidence. In fact it appears that nobody connected with the Toledo Company knows what the charges in this account rep-resent.

1574 Because of the absence of evidence as to the transactions and expenditures upon which the items of expense found in this account are based, the amounts yearly that have been already included in the manufacture cost of cylinder scales should be de-ducted.

The following table "H" shows the amount that has been included each year in manufacturing cost on account of the charges in this Experimental Account and it shows also the amount of manufactur-ing cost after deducting these amounts:

"Table H."

1906.....	$82.96	charged	which	deducted	leaves	cost $1,138.25
1907.....	994.38	"	"	"	"	" 23,634.77
1908.....	2,896.49	"	"	"	"	" 60,903.28
1909.....	3,355.81	"	"	"	"	" 75,936.92
1910.....	4,801.54	"	"	"	"	" 119,786.04
1911.....	5,368.60	"	"	"	"	" 128,230.97
1912 (8 mo.).....	4,061.90	"	"	"	"	" 75,652.93

Commissions.

The salesmen of the Toledo Company were compensated for their services with commissions on sales. The amounts paid out on account of commissions for the various years of the accounting period are shown on the books of the company and are not in dispute.

There is a controversy between the parties as to the manner of arriving at the amount of commissions chargeable against cylinder scales. The plaintiff suggests that for the years 1906, 1907, 1908, 1909 and 1910 the commissions should be found by apportioning the total commissions shown on the books between cylinder and fan scales and that for the years 1911 and 1912, as defendant's account filed herein covering the last ten months of 1911 and the first eight months of 1912 shows the commissions paid to agents on cylinder scale sales and the number of cylinder scales sold during that time, the average commission on a scale should be found for the years 1911 and 1912 respectively and the average commissions so found should be applied to the number of cylinder scales sold in 1911 and 1912 respectively to ascertain the commissions for those two years.

Mr. Zolg who made the defendant's account reported the net commissions received by agents after the company had deducted therefrom excess allowances made by such agents to purchasers and did not report the amount of commission the agent was entitled to on such sales or that the company in fact paid. An agent some-
1575 times made a greater allowance to a purchaser than he was authorized to make. In such cases the excess allowance was charged against his commissions in the commission account and he was paid the difference between the commission earned on the sale and the amount of the excess allowance.

The defendant suggests that its accountants allocated the commissions for 1911 to cylinder scales and that such allocation should stand for the year 1911 and be used as a basis of arriving at commissions for the other years of the accounting period. The so-called allocation of 1911 was reached by reforming the commission account as shown on the books to conform to the theory of defendant's accountants and it was found impossible to allocate commissions to specific sales or to keep the business of 1911 separate and apart from the business of a portion of 1910 and a portion of 1912. The method used to ascertain commissions for the other years of the accounting period on the basis of 1911 might produce grossly inaccurate results, and the method used, the results of which are shown in the following table, is better suited to produce reasonably accurate results.

The plaintiff's suggestion as to the years 1906, 1907, 1908, 1909 nd 1910 has been adopted and as to the years 1911 and 1912 has een rejected. The defendant's suggestion has been rejected.

The commissions attributable to cylinder scales have been deter- nined by finding the per cent that total commissions bear to total et sales for each year and taking that per cent of cylinder net sales or each year. The net sales rather than gross sales have been used s the basis of calculation because commissions were allowed only on et sales. The following table shows the results:

"Table I."

	Per cent of commissions to total net sales.		Cylinder net sales.		Commissions chargeable to cylinder sales.
1906	31.73%	of	$5,544.00	gives	$1,759.11
1907	34.20%	"	148,057.00	"	50,635.49
1908	38.39%	"	448,259.64	"	172,086.82
1909	35.36%	"	579,700.78	"	204,982.20
1910	31.38%	"	777,393.05	"	243,945.94
1911	27.57%	"	782,893.93	"	215,843.86
1912 (8 mo.)	28.41%	"	519,490.27	"	147,587.19

1576 Commercial and Selling Overhead.

The total commercial and selling overhead of the Toledo Company for the entire accounting period is not in dispute. It is made up of the following accounts: District Managers' Salaries and Expenses, Branch Office Expense, Miscellaneous Selling Expense, Cash and Quantity Discounts, Collection and Exchange Expense, Fidelity Bonds Expense, Freight on Scales, Insurance, Dining-Room Expense, Legal Expense, Litigation Expense, Patent Expense, Office Payroll, Office Supplies, Postage, Recording Orders, Rents, Taxes, Telephone and Telegraph, General Expense.

There is a dispute as to whether in apportioning these expenses between cylinder and fan sales the apportionment should be made on the basis of net sales or on the basis of gross sales. Inasmuch as commercial and selling overhead is necessary in making sales, whether those sales stand or whether they are rescinded, the division should be made on the basis of gross sales.

The following table "J" shows the total commercial and selling overhead for the respective years and the portion thereof chargeable to cylinder sales. (For the per cent figures used herein see Table C.)

"Table J."

			Total commercial and selling.		Applicable to cylinder scales.
1906	1.09%	of	$142,971.51	gives	$1,558.39
1907	25.30%	"	145,800.00	"	36,887.40
1908	50.83%	"	188,249.67	"	95,687.30
1909	49.58%	"	279,869.26	"	138,759.18
1910	60.11%	"	367,934.92	"	221,165.65
1911	60.99%	"	406,626.99	"	248,001.70
1912 (8 mo.)	59.36%	"	274,573.75	"	163,046.98

In the above commercial and selling overhead apportioned to cylinder scale sales are included the following amounts of litigation and patent expenses that should be deducted:

"Table K."

1906	1.09%	of	$7,965.55,	$83.88	deducted	leaves	$1,474.51
1907	25.30%	"	14,173.88,	3,585.99	"	"	33,301.41
1908	50.83%	"	9,079.21,	4,614.06	"	"	91,9073.24
1909	49.58%	"	9,588.57,	4,754.01	"	"	134,005.17
1910	60.11%	"	13,012.65,	7,821.90	"	"	213,343.75
1911	60.99%	"	17,159.52,	10,465.59	"	"	237,536.11
1912 8 mo.)	59.36%	"	22,525.68,	13,371.24	"	"	149,675.74

1577 The expenses of the Legal Expense Account such, for example, as the expense of collecting accounts have been included in commercial and selling expenses. Litigation and Patent Expense are of a different character. The plaintiff introduced evidence as to these expenses in the years 1911 and 1912, showing that the items were for expenses of this litigation, expenses of obtaining patents in this and foreign countries and other like charges. No evidence was introduced by either side explaining the items in these accounts for the other years of the accounting period, and it must therefore be assumed that they are of the same general character and not allowable as deductions in favor of the defendant. For vouchers and copies of these accounts for 1911 and 1912 see Vol. 1 of the transcript, pp. 378-382, 391-395, 400-410, 328-334, 215-274.

Losses on Agents' and Customers' Accounts.

The amount to be allowed the defendant on account of losses on agents' and customers' accounts was adjusted by agreement between counsel before the Master. By this agreement there is to be allowed to the defendant 3% on net sales of cylinder scales for each year of the accounting period except for the eight months of 1912. As to that period it was agreed that the amount shown in the defendant's account which was for new scales only should be taken and to this figure should be added 3% of second-hand cylinder sales, making the amount shown in the table. In addition to the above it was

greed that $5,166.46 should be distributed over the years in proportion to the losses in those years as shown by the following table:

"Table L."

906 .....3%	on cyl. sales,	$166.32	plus	$5.27=	$171.59
907 .....3%	" " "	4,441.71	plus	233.99=	4,675.70
908 .....3%	" " "	13,447.79	plus	708.28=	14,156.07
909 .....3%	" " "	17,391.02	plus	916.45=	18,307.47
910 .....3%	" " "	23,321.79	plus	1,228.96=	24,550.75
911 .....3%	" " "	23,486.82	plus	1,147.17=	24,633.99
912 (8 mo.).....	(See above)	19,066.42	plus	926.34=	19,992.76
		101,321.87	plus	5,166.46=	106,488.33

Allowances.

The total allowances for second-hand scales taken in part payment for new scales for the different years of the accounting period are shown on the books of the Toledo Company, and the amounts shown are conceded to be correct. The books do not show how much
1578 of the allowances for any year was made on cylinder sales or how much was made on fan sales and some plan must be adopted to determine how much of the allowances is properly chargeable against cylinder scales.

The defendant claims that its accountants examined the books of the Toledo Company and allocated to cylinder sales the allowances actually made on cylinder scale sales for the year 1911, and contends that the amount so allocated should be the amount charged against cylinder sales for 1911 and that the amount to be charged against cylinder sales for the other years of the accounting period should be found by taking the per cent of cylinder gross sales for each of the other years of the accounting period that cylinder allowances as shown by such allocation bear to cylinder gross sales for the year 1911.

It is not claimed that the accountants made an exact allocation of allowances to cylinder scales for the year 1911. It is conceded that the attempted allocation included a portion of the business of 1910 and a portion of the business of 1912, and the manner in which the books were kept, without any effort to distinguish between fans and cylinders, and the great number of transactions that had to be analyzed in the time the accountants gave to this work render it uncertain whether the claimed allocation would produce reasonably accurate results.

The method adopted as most suitable to produce reasonably accurate results for all of the years of the accounting period is to take that per cent of total allowances that cylinder net sales bear to total net sales. Net sales rather than gross sales are used because when a sale was rescinded and the scale repossessed all allowances made on such rescinded sale were deducted from the allowance account.

The following table "M" shows the total allowances, the per cent of cylinder net sales to total net sales as given in Table D, and the allowances chargeable to cylinder sales:

"Table M."

	Total allowances.	Applicable to cylinders.		
1906	$18,554.45	1.14%	thereof	$211.52
1907	24,737.50	26.00%	"	6,431.75
1908	82,905.26	51.66%	"	42,828.86
1909	82,779.23	48.80%	"	40,396.26
1910	101,359.87	59.46%	"	60,268.58
1911	150,194.94	60.40%	"	90,717.74
1912	91,578.56	58.76%	"	53,811.56

1579 Interest on Investment.

That the defendant is entitled in this accounting to credit for interest on its investment in the business is not disputed. The plaintiff and defendant, however, disagree radically as to the proper basis for arriving at the amount for which defendant should have credit. The method suggested by the defendant has been adopted in this report; it is to take from the yearly statements, Plaintiff's Exhibits 8 to 15, the valuations of the tangible assets, excluding therefrom patents and good will, and on the investment thus ascertained for each year calculate interest at the rate of 5% per annum and apportion that interest so calculated to cylinder sales in the respective years on the ratio that cylinder gross sales bear to total gross sales as shown by Table C.

The following table "N" shows the total investment for each year, interest thereon at the rate of 5% per annum, and the amount of such interest apportionable to cylinder sales:

"Table N."

	Investment.	Interest at 5%.			Apportionable to cylinder sales.
1906	$362,040	$18,102	of which	1.09% =	$197.31
1907	423,220	21,161	" "	25.30% =	5,353.73
1908	551,820	27,591	" "	50.83% =	14,024.59
1909	634,600	31,730	" "	49.58% =	15,731.73
1910	950,000	47,500	" "	60.11% =	28,552.25
1911	1,000,000	50,000	" "	60.99% =	30,495.00
1912 (8 mo.)	1,000,000	33,333	" "	59.36% =	19,786.66

Canadian Business.

In addition to the business of the Toledo Company already considered, that company carried on a Canadian busines from sometime in 1908 to the end of the accounting period. The scales were all assembled in Canada and all sold in Canada though some of the parts were made at the Toledo plant and some of the parts were procured in Canada. The evidence does not make it clear whether at any time during the period all of the parts were made at the Toledo plant, nor does the evidence make it clear that at any time during the period all of the parts were made in Canada.

The first sales of cylinder scales in Canada were made in 1908, presumably through the agency of Joseph P. Cleal, as it appears from the evidence that in 1909, a year later, Cleal maintained a branch office in Toronto where parts were assembled into completed scales. Some time in 1910 an assembling plant was estab-
1580 lished at Windsor, Canada, and thereafter all scales sold in Canada were assembled at this plant. From the time Canadian scales began in 1908 to the time the Windsor plan was established in 1910 parts of scales were manufactured at the Toledo plant and shipped to Canada where they were assembled. Whether during this time all of the parts necessary to make a completed scale were sent from the Toledo plant or whether some of the parts were procured in Canada is not made clear by the evidence. After the assembling plant was established at Windsor in 1910 certain parts of the scales such as pinions, spiders, hubs, screws, etc., were shipped from Toledo to Windsor and other parts such as castings were procured and shipped direct from Hamilton, Ontario, to Windsor and there assembled.

The accounts relating to Canadian sales were carried on the books of the Toledo Company. Up to November 11, 1908, the Canadian sales were carried in the U. S. Sales Account, but on that day a Canadian Sales Account was opened. Beginning with the opening of the Windsor factory in 1910 the Canadian sales were kept in a separate section of the general journal of the company and a separate Canadian ledger was opened. Up until the beginning of 1912 there was no separate account kept of the items of expense of the Canadian business, but from the beginning of 1912 until the end of the accounting period the items of discount, collection, freight and legal expense were separated. Canadian items enter into other accounts such as postage, recording orders, losses on customers' accounts, miscellaneous expense, supplies account, lumber, packing and shipping, etc.

The following table shows the total Canadian sales, both fan and cylinder, and separately the total cylinder sales:

"Table O."

1908.....	Total	Sales,	$15,262.50,	Cylinder	Sales.....		$10,610.00
1909.....	"	"	77,667.41,	"	"	.....	48,924.50
1910.....	"	"	107,911.92,	"	"	.....	73,358.35
1911.....	"	"	149,644.23,	"	"	.....	97,798.51
1912 (8 mo.)...	"	"	108,960.00,	"	"	.....	67,190.45

The books and records of the Toledo Company show the total Canadian profits. The following table shows such total profits for both fans and cylinders, the per cent of cylinder sales to total Canadian sales, and the profits on cylinder sales:

1581 *"Table P."*

	Total profit.	Per cent of cyl. to total Canadian sales.	Cylinder profit.
1908	$6,317.67	69.52%	$4,392.04
1909	15,754.42	63.00%	9,925.28
1910	20,097.70	67.98%	13,662.41
1911	26,062.32	65.35%	17,031.73
1912 (8 mo.)	18,047.31	61.67%	11,129.78
Total cylinder profit, Canadian			$56,141.24

The figures given in the above tables "O" and "P" are not in dispute. They are shown in Plaintiff's Exhibits 8, 9, 10, 11 and 12 and are the figures adopted by both sides.

The plaintiff claims that it is entitled to be credited with the profits shown above in this accounting, but as Canadian scales were assembled and sold in Canada and not in the United States and some parts of the scales were during a part or all of the time procured in Canada, profits on such sales have not been included.

Since profits have not been allowed on Canadian business, the defendant should be charged with all expenses on account of Canadian business that have entered into cost figures heretofore considered in relation to the United States business, and this the defendant concedes. As the manufacturing cost of United States scales was obtained by using a per scale cost for direct labor and material and taking the per cent of the figure thus obtained that total factory overhead bore to total net sales to find the factory overhead, it follows that the manufacturing cost of United States scales does not include anything on account of Canadian scales and nothing should be charged on account thereof. There should, however, be charged against the defendant on account of Canadian business a proportionate part of commercial and selling overhead expense of the Toledo Company after deducting therefrom items of expense that are applicable only to sales made in the United States such as district managers' salaries and expenses, special salesmen's salaries and expenses, branch office expenses, etc. In addition to these deductions there should also be deducted litigation expense since litigation expense has not in this report been included in the expenses of the United States business. (See table K where same was deducted.)

The following statement shows the amount of expense each year in which Canadian business was done that should be charged against
the defendant in this accounting, or, what is equivalent,
1582 added to the plaintiff's profits, as having already entered into commercial and selling overhead expense of United States scales:

Year 1908.

Cylinder sales (net)	$437,076.75	
Fan " "	409,001.14	
Canadian " "	15,262.50	
Total	$861,340.39	

Of this total amount Canadian sales are 1.77%.

Total commercial and selling overhead is		$188,249.67
from which there should be deducted:		
Branch Office Expenses	343,911.03	
District Agents' "	8,089.85	
Litigation Expense	9,079.21	61,080.09
		$127,169.58

of which 1.77%, represented by the Canadian business, is $2,250.90. In 1908 there was charged to cylinder sales 5.83% of the total commercial and selling overhead; 50.83% of Canadian commercial and selling overhead, $2,250.90, is $1,144.13 which should be added to cylinder profits.

Year 1909.

Cylinder Sales (net)	$556,108.08	
Fan " "	583,572.67	
Canadian " "	77,767.41	
Total	$1,217,448.16	

Of this total amount Canadian sales are 6,22%.

Total commercial and selling overhead is		$279,869.26
from which there should be deducted:		
District Managers' Salaries	$5,680.00	
" " Expenses	8,302.74	
Special Salesmen's Salaries	2,755.00	
" " Expenses	1,610.27	
Branch Office Expenses	57,902.22	
Litigation Expense	9,588.57	85,838.80
		$194,030.46

of which 6.22% is $12,068.69, Canadian commercial and selling overhead. In 1909 there was charged to cylinder sales 1583 49.58% of the total commercial and selling overhead; 49.58% of Canadian commercial and selling overhead, $12,068.69, is $5,983.65 which should be added to cylinder profits.

Year 1910.

Cylinder Sales (net)	$722,625.76	
Fan " "	492,704.53	
Canadian " "	107,911.92	
Total	$1,323,242.21	
Total commercial and sell overhead is		$367,934.92
District Managers' Salaries	$39,323.37	
" " Expenses	12,287.88	
Special Salesmen's Salaries	7,552.16	
" " Expenses	3,426.89	
Branch Office Expenses	83,157.90	
District Managers' Convention	145.25	
Litigation Expense	13,012.65	
		158,906.10
		$209,028.82

Of this total amount Canadian sales are 8.15%.

from which there should be deducted:

of which 8.15% is $17,035.85, Canadian commercial and selling overhead. In 1910 there was charged to cylinder scales 60.11% of the total commercial and selling overhead; 60.11% of Canadian commercial and selling overhead, $17,035.85, is $10,240.24 which should be added to cylinder profits.

Year 1911.

Cylinder sales (net)	$725,671.39	
Fan " "	475,770.27	
Canadian " "	149,644.23	
Total	$1,351,085.89	
Total commercial and selling overhead is		$406,626.99

Of this total amount Canadian sales are 11.70%.

from which there should be deducted:

1584

District Managers' Salaries	$42,400.37	
" " Expenses	11,577.91	
" " Convention	252.25	
Special Salesmen's Salaries and Expenses	66.29	
Branch Office Expenses	115,173.59	
Freight Outbound	12,991.19	
Freight Inbound	2,844.67	
Litigation Expense	17,159.52	
		202,465.79
		$204,161.20

of which 11.70% is $23,886.86, Canadian commercial and selling overhead. In 1911 there was charged to cylinder sales 60.99% of the total commercial and selling overhead; 60.99% of Canadian commercial and selling overhead, $23,886.86, is $14,568.59 which should be added to cylinder profits.

Year 1912 (8 Mo.).

Cylinder sales (net)	$469,031.71
Fan " "	329,244.01
Canadian " "	108,960.00
Total	$907,235.72

Of this total amount Canadian sales are 12.01%.

Total commercial and selling overhead is..... $274,573.75

from which should be deducted:

District Managers' Salaries	$24,247.70	
" " Expenses	6,142.10	
Branch Office Expenses	66,654.29	
District Managers' Convention	1,381.95	
Freight Outbound	8,365.44	
Freight Inbound	2,800.82	
Cash Discounts	10,242.80	
Collection and Exchange	3,476.41	
Legal Expenses	7,840.30	
Quantity Discount	883.50	
Litigation Expense	22,525.68	
		154,560.99
		$120,012.76

of which 12.01% is $14,413.53, Canadian commercial and selling overhead. In 1912 there was charged to cylinder sales 59.36% of the total commercial and selling overhead; 59.36% of
1585 Canadian commercial and selling overhead, $14,413.53, is $8,555.87 which should be added to cylinder profits.

The following table "Q" shows the proportion of commercial and selling overhead expenses to be added to cylinder profit on account of Canadian business:

"Table Q."

1908	$1,144.13
1909	5,983.65
1910	10,240.24
1911	14,568.59
1912 (8 mo.)	8,555.87
Total	$40,492.48

Statement of Whole Account.

The following statement is based on figures in the tables already given, "A" to "Q" inclusive, and shows the profits on cylinder scales for each year of the accounting period:

1906.

Cylinder Gross Sales		$5,760.00
Deduct Charge Backs		216.00
Cylinder Net Sales		$5,544.00
Deduct Manufacturing Cost	$1,138.25	
" Commissions	1,759.11	
" Commercial & Selling	1,474.51	
" Losses	171.59	
" Allowances	211.52	
" Interest	197.31	
		4,952.29
		$591.71

1907.

Cylinder Gross Sales		$154,758.00
Deduct Charge Backs		6,922.00
Cylinder Net Sales		$147,836.00
Add second-hand sales proportion		221.00
		$148,057.00
Deduct Manufacturing Cost	$23,634.77	
" Commissions	50,635.49	
" Commercial & Selling	33,301.41	
" Losses	4,675.70	
" Allowances	6,431.75	
" Interest	5,353.73	
		$124,032.85
		$24,024.15

1908.

Cylinder Gross Sales		$459,372.50
Deduct Charge Backs		22,295.75
Net Cylinder Sales		$437,076.75
Add second-hand sales proportion		11,182.89
Add Canadian Commercial Overhead proportion		1,144.13
		$449,403.77
Deduct Manufacturing Cost	$60,903.28	
" Commissions	172,086.82	
" Commercial & Selling	91,073.24	
" Losses	14,156.07	
" Allowances	42,828.26	
" Interest	14,024.50	
		395,072.17
		$54,331.60

1587

1909.

Cylinder Gross Sales		$605,466.41
Deduct Charge Backs		49,358.33
Net Cylinder Sales		$556,108.08
Add second-hand sales proportion		23,592.70
Add Canadian Commercial Overhead proportion		5,983.65
		$585,684.43
Deduct Manufacturing Cost	$75,936.92	
" Commissions	204,982.20	
" Commercial & Selling	134,005.17	
" Losses	18,207.47	
" Allowances	40,396.26	
" Interest	15,731.73	
		$489,259.75
		$96,424.68

1910.

Cylinder Gross Sales	$789,358.11
Deduct Charge Backs	66,732.35
Net Cylinder Sales	$722,625.76
Add second-hand sales proportion	54,767.29
Add Canadian Commercial Overhead proportion	10,240.24
	$787,633.29

Deduct Manufacturing Cost	$119,786.04	
" Commissions	243,945.94	
" Commercial & Selling	213,343.75	
" Losses	24,550.75	
" Allowances	60,268.58	
" Interest	28,552.25	
		$690,447.31
		$97,185.98

1588 1911.

Cylinder Gross Sales	$803,608.01
Deduct Charge Backs	77,985.87
Net Cylinder Sales	$725,622.14
Add second-hand sales proportion	57,271.49
Add Canadian Commercial Overhead proportion	14,568.59
	$797,462.22

Deduct Manufacturing Cost	$128,230.97	
" Commissions	215,843.86	
" Commercial & Selling	237,536.11	
" Losses	24,633.99	
" Allowances	90,717.74	
" Interest	30,495.00	
		$727,457.67
		$70,004.55

1912 (8 Mo.).

Cylinder Gross Sales	$516,216.61
Deduct Charge Backs	47,184.90
Net Cylinder Sales	$469,031.71
Add second-hand sales proportion	50,458.56
Add Canadian Commercial Overhead proportion	8,555.87
	$528,046.14

Deduct Manufacturing Cost	$75,652.93	
" Commissions	147,587.19	
" Commercial & Selling	149,675.71	
" Losses	19,992.76	
" Allowances	53,811.56	
" Interest	19,786.66	
		$466,506.84
		$61,539.30

Profit for 1906	$591.71
" " 1907	24,024.15
" " 1908	54,331.60
" " 1909	96,424.68
" " 1910	97,185.98
" " 1911	70,004.55
" " 1912	61,539.30
Total profits	$404,101.97

1589

6.

Scales on Hand.

When the patent expired on the 3rd day of September, 1912, the Toledo Company had on hand manufactured and ready for sale 1,839 cylinder scales. These scales were manufactured during the infringing period and ready for sale after the close of the infringing period.

It is claimed that while these scales had not been sold when the patent expired, there was a profit in them that the plaintiff is entitled to recover in this suit.

The profit made on 20,824 cylinder scales sold during the entire accounting period was $404,101.97 or $19.40 per scale. The profit made on the 2,894 cylinder scales sold during the eight months of 1912 immediately preceding the expiration of the patent was $61,539.30 or $21.26 per scale. The plaintiff claims that it is entitled to recover as profits for scales on hand at the close of the accounting period $19.40 per scale, being the average profit for the entire accounting period, amounting to $35,676.60.

Inasmuch as the profit in scales on hand was not in fact realized during the accounting period and can only be inferred, and the evidence does not show that profit was realized afterwards by the defendant, such profit has not been included in this accounting.

7.

Good Will.

The plaintiff claims that it should be allowed as profits in this accounting the value of the business gained by the defendant through its infringement, basing its claim on the fact that at the end of the accounting period the defendant had acquired by its infringement a going business in indicator drum scales of about $800,000 a year upon which a large profit was made.

While there can be no doubt that the business in cylinder scales built up by the defendant during the infringing period was a gain, value or advantage to the defendant at and after the close of that period, I find no evidence upon which to base a finding of money value that should be allowed on account thereof. Any allowance would necessarily be based on speculation. I have therefore not included anything on account of good will in this accounting.

1590 8.

Division of Profits.

The plaintiff proved that substantial profits were realized by the defendant in making and selling the infringing scale. This the defendant does not deny, but it contends that not all of the profits made are due to the patent because there were embodied in its cylinder scale non-infringing elements and improvements, patented and unpatented, such as the counter-force system, base and lever system, dash-pot, shock absorber, leveling device, etc. that contributed to the profit fund.

The eight patents under which defendant claims its cylinder scales were built were introduced in evidence as follows: Reissue No. 12,138, Defendant's Exhibit 63; No. 667,652, Defendant's Exhibit 38; No. 830,976, Defendant's Exhibit 39; No. 839,736, Defendant's Exhibit 37; No. 1,068,616, Defendant's Exhibit 47; No. 1,122,222, Defendant's Exhibit 60; No. 1,142,165, Defendant's Exhibit 62; and No. 1,166,128, Defendant's Exhibit 59. These patents are combination patents and do not cover the elements separate from the combination.

The elements that defendant contends contributed to the profits were old and open to the public and none of them, if separated from the structure of which it is a part, would in itself be a usable or workable tool.

Two infringing scales were introduced in evidence, one marked Complainant's Exhibit Defendant's Scale and the other Defendant's Exhibit 55, disclosing the structural parts of the completed scale.

The defendant called three witnesses experienced in the scale art: Halvor O. Hem, Consulting Engineer for the Toledo Scale Company; Charles G. Neale, Commissioner of Weights and Measures for the State of Minnesota; and Dr. Fritz Reichmann, formerly State Superintendent of Weights and Measures for the State of New York, now at the head of the Service Department of the Fairbanks Company of New York. Hem and Neal explained the various parts of an automatic computing scale and pointed out those parts on the scale exhibits mentioned above. Neither testified as to the value, mechanically, commercially or otherwise, of the separate parts. Dr. Reichmann went more into detail, explained the parts of an automatic computing scale, giving the relative importance from a mechanical and also from an economic standpoint of the different parts in per cent figures as follows:

1591 From a mechanical standpoint: (1) Counterforce system 50%; (2) Base and lever system 25%; (3) Connection between counterforce system and indicating mechanism 2%; (4) Dash-pot 5%; (5) Shock Absorber 2%; (6) Mounting for indicating device 5%; (7) Leveling device 5%; (8) Particular form of indicating device 2%; (9) Method of arranging figures on indicating device 2%; (10) Arrangement of openings to facilitate readings of such figures by dealer and customer 2%; making up a total of 100%.

From an economic standpoint: (1) Signs appearing on scale 5%; (2) Housing of scale 10%; (3) Lever system and combination of a platform and indicating scale, robust appearance and color, 20%; Leveling device 5%; Dash-pot and Shock Absorber 5%; Divisions on particular chart used, 2%; Openings with correct reference marks on customer's and dealer's side for reading figures, 2%; Particular form of indicating device, 2%; Counterforce system, 49%; making up a total of 100%.

Dr. Reichmann explained the necessary parts of a complete automatic computing scale without regard to whether it was of the cylinder, cone, dial or disc variety. He dealt with physical parts of a scale and made no distinction between the different kinds of indicating devices or between different devices of the same general kind but of different construction such as light and heavy cylinders. He wholly disregarded the question as to whether any of the parts were covered by patents, combination or otherwise, and did not take the patent in suit into account at all in assigning a value, mechanical or economic, to the indicating device or cylinder to which the patent applies. This may account for his conclusion that the importance of that part of the scale covered by the patent is but two per cent. of the whole. The calculations made by Dr. Reichmann as to the relative values of the different parts of a complete machine without considering the value of a patent on one of the essential parts is not helpful in an effort to determine whether all or only a portion of the profits on the sales of the completed scales is due to such patent.

The Toledo Company advertised the infringing scale extensively, principally by circulars distributed to the purchasing public. These circulars called attention pointedly to the features of the scale that the company claims make it superior to all others, particularly that the defendant's scale contains no springs, but is of the pendulum variety. On this feature of its scale defendant predicates its
1592 slogan "No Springs—Honest Weight". The defendant did not in its advertising literature mention the light drum, the feature of the Smith patent. What effect such advertising had on sales is not known. No evidence was offered on that question.

The evidence considered in this division of the report is the only evidence in the case bearing directly on the question of a division of profits. It is not sufficient, as I view it, especially when read in connection with the decision of the Circuit Court of Appeals relating to the character and scope of the patent and its far reaching effect in the computing scale art, to establish that any portion of the profits is due to causes other than the patent.

Findings of Law.

I find the law of the case to be that the plaintiff is entitled to a decree against the defendant for $404,101.97, the profits made by the defendant company on the manufacture and sale of the infringing scale.

Most of the questions involved in this case are disposed of as questions of fact, or are covered by elementary principles of law.

There were 1839 cylinder scales, manufactured during the infringing period, on hand at the close of the period. Plaintiff contends that in these scales a profit inhered that was afterwards realized, and that the plaintiff is entitled to recover in this accounting as profits an amount per scale equal to the average profit per scale realized on the sale of the same kind of scales during the infringing period. No evidence was introduced as to market conditions prevailing after the close of the infringing period. Conditions may have been such that no profit at all was made on scales sold after the patent expired. Recoverable profits in accounting cases are profits actually realized, potential or prospective profits cannot be recovered.

In the account as stated cylinder scales have been made to bear overhead expenses on a proportion basis. The Toledo Company had an established plant and business and was selling fan scales at the time it began to make and sell the infringing scale, and the plaintiff contends there should only be charged against cylinder scales such expense as the evidence may show was added on account of the cylinder scale business. The rule laid down in the Tremolo
1593 patent case, 23 Wallace 518, seems just and equitable as applied to the facts in this case and has been adopted.

The plaintiff contends that, in view of the facts and circumstances and especially that the defendant has been allowed five per cent interest on its capital invested, the plaintiff should be allowed in this accounting the value of the good will built up on cylinder scales during the infringing period. The good will of a business built up by an infringer is a gain or advantage, but not a profit, and its value cannot be recovered as profits. This suit has proceeded on the theory of recovering profits; besides there is no evidence as to the value of the good will and none upon which a finding in money value could be based.

The defendant urges that the evidence brings this case within division d, paragraph 1, of Westinghouse v. Wagner, 228 U. S. 604, 614; that as it appears from the evidence a part only of the profits was due to the patent, the burden of proof rested on the plaintiff to show that the entire marketable value of the scale is attributable to the patented feature, or to give evidence tending to segregate profits between the patented and unpatented features, or to show that by reason of intermingling the profits cannot be apportioned; that the plaintiff has not sustained this burden and is not entitled to recover more than a nominal sum. This contention is disposed of so far as the master is concerned by the finding of fact to the effect that the evidence when read in connection with the decision of the Circuit Court of Appeals is not sufficient to establish that any portion of the profits made is due to causes other than the patent.

It is a cardinal rule of patent law that where a patent produces but a part of the profits the plaintiff may recover only such part of the profits as the patent produces and the defendant may have credit for the remainder, and this rule holds good in cases where the patented part is so connected with other essential parts of the ma-

chine that if removed and nothing substituted in its place what remains will not be a complete or workable machine as well as in cases where the patented portion is separable and when separated leaves the remainder a complete workable machine. Westinghouse v. Wagner, 225 U. S. 604; Dowagiac v. Minnesota, 235 U. S. 641; Herman v. Youngstown Co., 216 Fed. 607; Dunn v. Standard Co., 204 Fed. 617; Robbins v. Illinois Watch Co., 81 Fed. 958.

The cases cited above are cases in which a separation of the patented from the other parts would not leave a complete machine,
1594 it is too well settled to cite authorities that if the patented part of a machine be removed and what remains is a complete workable machine, segregation of profits should be made.

In reaching conclusions as to segregation the decision of the Circuit Court of Appeals in this case (208 Fed. 410) is controlling and what is said there is binding on the master. Crosby Valve Co. v. Safety Valve Co., 141 U. S. 441, 447.

It was urged by counsel for defendant that claims 5 and 6 of the Smith patent in suit were not combination claims and that Smith himself had designated his invention as an improvement, that cylinder scales had been made and used prior to Smith's patent and that what Smith did was simply to improve the cylinder by making it very light. It is a complete answer to this contention that it appears from the decision itself the Circuit Court of Appeals was not unmindful of what Smith said in his claims and other patent papers or of the fact that Smith was not the first to use cylinder drums in computing scales.

It is not contended that claims 5 and 6 are combination claims. that Smith obtained a patent on every element of every computing scale in which the patent invention might be used, but it is contended—and this contention is borne out by the decision—that Smith alone had the right to connect his patented part with any weighing mechanism and that Smith's patent covered the cylinder drum in connection with any weighing mechanism.

It does not follow that because a patent covers a mere improvement, profits must necessarily be segregated. Whether they shall or shall not depends upon the nature and character of the improvement itself, and it may be that an improvement will be of such a character as to produce a new result and be the cause of producing all of the profits. In this case Smith invented the first usable automatic computing scale, he brought about a new result and became entitled to all of the profits regardless of how he may have designated his invention in his patent papers. An inventor is entitled to the full benefit of what he actually invents whether he sees fit to call it an improvment or to call it something else. The courts have recognized that a mere improvement or attachment is one thing and that an improved machine that produces a new result is another thing.

This case comes within division a of paragraph 1 of the Westinghouse case.

1595 Objections.

The undersigned master further reports that on the 26th day of February, 1918, he caused a notice in writing together with a copy of his draft report to be served upon counsel for the respective parties, notifying them that objections might be filed to such report on or before the 6th day of March, 1918. Thereafter at the request of counsel the time for filing objections was extended to the 26th day of March, 1918. Within said time counsel for plaintiff filed objections numbered 1 to 28 inclusive and counsel for defendant filed objections numbered 1 to 34 inclusive. Arguments were made on such objections on Friday, April 19, 1918.

The master has considered the objections filed and his report and overrules each and all of such objections except as hereinafter specifically stated.

Plaintiff's Objection No. 1 is sustained to the extent that the last sentence in paragraph 2, page 7 of the report, beginning with the word "after" is stricken out and the following sentence substituted:

After some discussion it was agreed that Zolg should be produced before the master for oral examination, and Zolg was produced and examined, and on February 13, 1915, counsel for plaintiff asked leave to examine the books, papers and documents of the defendant which motion was on February 16, 1915, allowed by the master, and thereupon the said books, papers and documents were examined and an account prepared by accountants for the plaintiff, and Zolg and other employes of defendant were afterwards produced and examined at Toledo where the books and records were, and the motion for an order on defendant to make a further account was not again called to the master's attention.

In all other respects the objection is overruled.

Plaintiff's Objection No. 2 is sustained to the extent that the master finds that the scale marked Complainant's Exhibit Defendant's Scale, held in the Circuit Court of Appeals in this case to be infringing, has steel spiders, was made by the defendant prior to the 10th day of April, 1908, and on that day was shipped in fulfillment of an order.

Plaintiff's Objection No. 3 is sustained to the extent that the last sentence in the second paragraph on page 6 of the report beginning with the word "such" is stricken out and the following sentence substituted:

1596 Such excess allowance the agent had to stand and the amount was charged against his account.

The word "commissions," being the first word in the 14th line on page 19 of the report, is also stricken out and the word "agent's" substituted. In all other respects the objection is overruled.

Plaintiff's Objection No. 26 is sustained and the words "or rebuilt" in the 4th line on page 6 of the report are stricken out and the words "if necessary" inserted in their place.

Defendant's Objection No. 3 should be sustained to the extent that the master finds that all of defendant's scales had front and

k indications substantially as in complainant's Exhibit Defend-
's Scale. In all other respects the objection is overruled.
herewith return into court a true and correct transcript of the
imony and proceedings had and taken before me consisting of
30 pages and index, bound in seven volumes; the objections filed
the plaintiff marked "Objection Exhibit A;" the objections filed
the defendant marked "Objection Exhibit B;" and the account
d by the defendant on January 15, 1915, called in this report
fendant's account."
also return herewith Plaintiff's Exhibits 2 to 15 inclusive, 38
3 inclusive, 57, 62, 63, 66 to 74 inclusive, and 77 to 80 inclusive.
aintiff's Exhibits 1, 45 to 52 inclusive, 56, and 58 to 61 inclusive
e marked for identification only and are therefore not returned.
intiff's Exhibits 16 to 32 inclusive, 37, 44, 53, 54, 55, 64, 65, 75
76 are either copied or bound in the transcript. Plaintiff's Ex-
its 33, 34, 35 and 36 are copies of income tax statements of the
edo Company and are in the hands of some of the attorneys
nected with the case. It was agreed that if they are not pro-
ed defendant will produce the originals now in its possession
ore the court if desired by the court or counsel.)
also return herewith Defendant's Exhibit 21, 22, 23, 26, 27, 28
34 inclusive, 37 to 54 inclusive, 56, 57, 58, 59, 61, 64, 65 and
hibit: Affidavit on motion to reopen." (Defendant's Exhibits
o 20 inclusive were marked for identification only and are there-
e not returned. Defendant's Exhibits 24, 25, 35, and 36 are copied
the record. Defendant's Exhibit 55 is a scale and by agreement
remains in the custody of defendant. Defendant's Exhibits
07 60, 62 and 63 are patents that have been retained by counsel
for defendant and are not now in the master's custody. De-
dant's Exhibits 66 and 67 are depositions on file in the clerk's
ce.)

Respectfully submitted,

CHARLES B. MORRISON,
Master in Chancery of the District Court of the United States, Northern District of Illinois.

(Endorsed:) Filed May 6, 1918. T. C. MacMillan, Clerk.

Filed Mar. 26, 1918.

In the United States District Court, Northern District of Illinois, Eastern Division.

In Equity.

No. 30024.

THE COMPUTING SCALE COMPANY, Plaintiff,

vs.

TOLEDO COMPUTING SCALE COMPANY, Defendant.

On Accounting Before Hon. Charles B. Morrison, Master.

Suggestions for Findings Submitted by Defendant.

Findings of Fact.

1. The defendant began the manufacture of aluminum spiders for use in drums in cylinder scales for the first time on March 8, 1911 (pp. 19, 163) and thereafter up to and including September 3, 1912, 4,611 cylinder scales were sold by the defendant. (pp. 162, 182, 302, 357.) This number includes all cylinder scales irrespective of the material of which the drums were made sold after said March 8, 1911.

2. That in the year 1906, 57 cylinder scales were sold by the defendant, of which two were returned. (pp. 534, 549.)

3. That in the year 1907, 1,221 cylinder scales were sold by the defendant, of which 62 were returned. (pp. 534, 550.)

4. That in the year 1908, 3,232 cylinder scales were sold by the defendant (pp. 534, 550), of which 183 were returned, and
1598 that of the scales so sold two were sold in Mexico and one in Holland (pp. 799, 587), and 64 were sold in Canada. (p. 589.)

5. That in the year 1909, 4,227 cylinder scales were sold by the defendant (pp. 537, 550), of which 394 were returned and 320 were sold in Canada. (p. 589.)

6. That in the year 1910, 5,356 cylinder scales were sold by the defendant (pp. 540, 550), of which 559 were returned, and 460 were sold in Canada. (p. 589.)

7. That in the year 1911, 5,130 cylinder scales were sold by defendant (pp. 541, 551), of which 654 were returned, and 621 were sold in Canada. (p. 589.)

. That for the period from January 1, 1912 to August 31, 1912, lusive, 3,118 cylinder scales were sold by defendant (pp. 542,), of which 369 were returned, and 397 were sold in Canada. 589.)

. That the record does not disclose just how many of the re-ssessed scales were sold as secondhand scales, and that upon the umption that all repossessed scales were sold as secondhand scales the year 1911, the number of new cylinder scales sold were 5,297, l that the total revenue derived from the sale of cylinder scales \$800,554.02. (See Defendant's Exhibit No. 22 and testimony W. E. Seatree, p. 1137).

10. That the amount of charge-backs for such business of 1911 ng for 665 scales was the sum of \$93,386.17. (See Defendant's hibit No. 22, and testimony of W. E. Seatree, p. 1139).

11. That the amount of sales for the year 1911 of new cylinder les upon the basis aforesaid was \$707,167.85. (See Defendant's hibit No. 22, and testimony of W. E. Seatree, p. 1142).

12. That the amount of allowances for exchange and secondhand ledo scales and for any special allowances for the year 1911 made the defendant was \$117,885.06 (see Defendant's Exhibit No. 22, d testimony of W. E. Seatree, p. 1144), leaving a balance of net linder scale business of \$589,282.79, (see Defendant's Exhibit No. and testimony of W. E. Seatree, p. 1144), from which there ould be deducted the sum of \$1,168.25, the loss on the sale of re-ished and secondhand scales taken as part payment, leaving a lance of new cylinder scale business of \$588,114.54. (See De-ndant's Exhibit No. 22, testimony of W. E. Seatree, p. 1159.)

99 13. That from said sum of \$588,114.54 there should be deducted the following items:

actory cost of cylinder scales above	\$143,067.84
ommissions to agents	188,941.94
sses on Agents Accounts	24,016.62
ll other commercial expenses	226,045.27
iscellaneous charges and credits	10.00
Making a deduction of	\$582,081.67

Leaving a balance before charging interest on investment of 6,032.87. (See Defendant's Exhibit No. 22, and testimony of W. . Seatree, pp. 1150-62, 1195-8.)

14. That assuming all repossessed scales in the year 1911 to have een sold as new scales, the profit on cylinder scales before charging nterest on the investment, and losses on agents and customers ac-ounts, was the sum of \$37,812 43, (see Defendant's Exhibit No. 61, nd testimony of W. E. Seatree, p. 2459), and that after deducting sses on agents' and customers' accounts and before deducting inter-

cost on investment upon the basis last mentioned, such profits were the sum of $11,191.19. (See Defendant's Exhibit No. 61, and testimony of W. E. Seatree, p. 2459.)

15. That in the year 1906 the total profits from the sale of cylinder scales before charging losses on agents' and customers' accounts and interest on investment, was $851.79. (See Defendant's Exhibit No. 61, and testimony of W. E. Seatree, p. 2462.)

16. That in the year 1907 the total profit from the sale of cylinder scales before charging losses on agents' and customers' accounts and interest on investment was the sum of $21,520.21. (See Defendant's Exhibit No. 61, and testimony of W. E. Seatree, p. 2464.)

17. That in the year 1908, the total profit on the sale of cylinder scales before deducting losses on agents' and customers' accounts and interest on investment was the sum of $51,439.79. (Defendant's Exhibit No. 61, and testimony of W. E. Seatree, p. 2466.)

18. That in the year 1909 the total profit on the sale of cylinder scales before deducting losses on agents' and customers' accounts and interest on investment was the sum of $94,820.26. (See Defendant's Exhibit No. 61, and testimony of W. E. Seatree, p. 2468.)

19. That in the year 1910 the total profit on the sale of 1600 cylinder scales before deducting losses on agents' and customers' accounts and interest on investment was the sum of $87,643.83. (See Defendant's Exhibit No. 61, and testimony of W. E. Seatree, p. 2470.)

20. That in the year 1911 the total profit on the sale of cylinder scales before deducting losses on agents' and customers' accounts and interest on investment was the sum of $37,812.43. (See Defendant's Exhibit No. 61, and testimony of W. E. Seatree, p. 2473.)

21. That for the period from January 1, 1912, to August 31, 1912, inclusive, the total profit on the sale of cylinder scales before deducting losses on agents' and customers' accounts and interest on investment was the sum of $48,815.68. (See Defendant's Exhibit 61, and testimony of W. E. Seatree, p. 2474.)

22. That the total profits on the sale of cylinder scales for the accounting period before deducting losses on agents' and customers' accounts and interest on investment was $342,903.99. (See Defendant's Exhibit 61.)

23. That in the year 1906 the losses on agents' and customers' account- computed at three per cent on the gross sales of cylinder scales was the sum of $172.80. (See Defendant's Exhibit 61, and testimony of W. E. Seatree, p. 2435.)

24. That in the year 1907 the losses on agents' and customers' accounts, computed at three per cent on gross sales of cylinder scales, was $4,654.16. (See Defendant's Exhibit 61, and testimony of W. E. Seatree, p. 2428.)

25. That in the year 1908 the losses on agents' and customers' account computed at three per cent on gross sales of cylinder scales, was $14,243.59. (See Defendant's Exhibit No. 61, testimony of W. E. Seatree, p. 2439.)

26. That in the year 1909 the losses on agents' and customers' account- computed at three per cent on the gross sales of cylinder scales was the sum of $19,181.79. (See Defendant's Exhibit No. 61, testimony of W. E. Seatree, p. 2443.)

27. That in the year 1910 the losses on agents' and customers' account- computed at three per cent on gross sales of cylinder scales was the sum of $25,844.07. (See Defendant's Exhibit No. 61, and testimony of W. E. Seatree, p. 2447.)

28. That in the year 1911 the losses on agents' and customers' accounts computed at three per cent on gross sales of cylinder scales was the sum of $26,621.24. (See Defendant's Exhibit No. 61, and testimony of W. E. Seatree, p. 2459.)

1601 29. That for the period beginning January 1, 1912, and ending August 31, 1912, the losses on agents' and customers' accounts computed at three per cent on gross sales of cylinder scales, was the sum of $17,706.70. (See Defendant's Exhibit 61, and testimony of W. E. Seatree, p. 2487.)

30. That the amount of interest on investment applicable to the cylinder scale business for the year 1906 which should be deducted from the profits for said business, is the sum of $198.00. (See Defendant's Exhibit No. 61, and testimony of W. E. Seatree, p. 2435.)

31. That the amount of interest on investment applicable to the cylinder scale business for the year 1907 which should be deducted from the profits of said business, is the sum of $15,353.81. (See Defendant's Exhibit No. 61, and testimony of W. E. Seatree, p. 2429.)

32. That the amount of interest on investment applicable to the cylinder scale business for the year 1908 which should be deducted from the profits of said business is the sum of $14,024.88. (See Defendant's Exhibit No. 61, and testimony of W. E. Seatree, p. 2439.)

33. That the amount of interest on investment applicable to the cylinder scale business for the year 1909 which should be deducted from the profits of said business is the sum of $15,734.89. (See Defendant's Exhibit No. 61, and testimony of W. E. Seatree, p. 2443.)

34. That the amount of interest on investment applicable to the cylinder scale business for the year 1910 which should be deducted from the profits of said business is the sum of $28,556.71. (See Defendant's Exhibit No. 61, and testimony of W. E. Seatree, p. 2447.)

35. That the amount of interest on investment applicable to the cylinder scale business for the year 1911, which should be deducted

from the profits of said business is the sum of $30,349.50. (See Defendant's Exhibit No. 61, and testimony of W. E. Seatree, p. 2459.)

36. That the amount of interest on investment applicable to the cylinder scale business for the period beginning January 1, 1912, and ending August 31, 1912, which should be deducted from the profits of said business is the sum of $19,792.96. (See Defendant's Exhibit No. 61, and testimony of W. E. Seatree, p. 2456.)

37. That the total amount of interest so to be deducted is the sum of $114,010.75. (See Defendant's Exhibit No. 61.)

38. That the total amount of deductions for losses on
1602 agents' and customers' accounts and interest on investment is the sum of $222,435.10. (See Defendant's Exhibit No. 61.)

39. That after the deductions aforesaid the total profit on the cylinder scales sold by defendant for the accounting period is the sum of $120,468.89. (See Defendant's Exhibit 61.)

40. That the device, a patent for which has been sustained by the decree in this case, is one of many involved in the complete structure known as a computing scale such as was manufactured and sold by the defendant through the accounting period.

41. That the elements in the platform, automatic, computing and weighing scale, such as is involved herein, are (1) the counterforce system, (2) the supporting base and lever, (3) dash-pot, (4) shock absorber, (5) openings in housing, (6) indicating mechanism, (7) mounting of indicating mechanism, (8) housing, (9) leveling devices. (See testimony of Dr. Fritz Reichmann, p. 2784, and of Charles C. Neale, p. 2764.)

42. That the relative value and importance of such elements is approximately as follows:

Counterforce system	50 per cent.	(p. 2819).
Base and lever system	25 per cent.	(p. 2819).
Connections for lever system	2 per cent.	(pp. 2915, 2820).
Dash-pot	5 per cent.	(p. 2820).
Shock absorber	2 per cent.	(p. 2820).
Mounting for indicating device	5 per cent.	(p. 2821).
Leveling device	5 per cent.	(p. 2821).
Whole indicating device	6 per cent.	(pp. 2917, 2821).
Total	100 per cent.	

That the last mentioned part of this indicating device for which a total relative value of six per cent was given, is further divisible into three sub-divisions of substantially equal value and importance, viz:

Particular form of such indicating device..... 2 per cent.
Method of arranging figures on such indicating device.. 2 per cent.
Arrangement of openings to facilitate reading of such figures by dealer and customer..... 2 per cent.
(See pp. 2821, 2822.)

43. That the device of the complainant in this case for which patent was issued is one of the varieties of the elements described as indicating device under the sub-division of form of such device, and as such has a relative value and importance as compared with the whole device of two per cent.

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44. That during the accounting period the defendants sold 2,988 cylinder scales equipped with an electric light attachment, (see testimony of W. A. Zolg, p. 2527) for which it received $25.00 per scale additional price in excess of that received for similar scales not so equipped, or a total of $74,700.00. (See testimony of Henry Theobald, p. 2291.)

45. That the factory cost per scale of such attachment was $2.95 for material, (see testimony of W. L. Flaherty, pp. 2502-6) and 27½ cents for labor, (see testimony of George H. Mould, p. 2523), making a total cost per scale of $3.23, or a total factory cost of the scales in question, $9,651.24.

46. That the factory overhead computed as 68.76 per cent of such labor and material, viz., $9,651.24, is the sum of $66,136.19, and commissions computed as 26.718 per cent of such extra selling price is the sum of $19,958.34, and commercial and selling expenses computed as 31.964 per cent of such extra selling price is the sum of $23,877.10, and that such amounts aggregate a total amount of $60,122.87 which should be deducted from the total selling price of such scales, leaving a net profit from such electric equipment of $14,577.13, which amount should be deducted from the total profits received from the sale of cylinder scales, viz., $120,468.89 as above set forth in finding No. 39. (For the percentages of the deductions aforesaid see Exhibit No. 22, pp. 1 and 11.)

47. That during the accounting period the defendant sold 8,445 scales finished in a special lacquer known as a gold finish, (see testimony of W. N. Randolph, p. 2531), for which it received a price of $10.00 per scale in excess of that received for similar scales not so finished, (see testimony of Henry Theobald, p. 2289), or a total extra price received of $84,450.00, and that the factory cost of such gold finish was 78 cents per scale, or a total extra cost of $66,012.43. (See testimony of W. L. Flaherty, p. 2547, and George F. Kellerman, p. 2543.)

48. That the factory overhead upon the said sum of $6,612.43 computed as in finding 46, is the sum of $4,546.71, and that the commissions to agents computed upon said sum of $84,450.00, as in finding 47, is the sum of $22,563.32, and that all other commercial and selling expenses upon said sum of $84,450.00 computed as in

finding 46, is the sum of $26,993.59, which last three sums,
1604 together with the cost of material and labor above found, make a total amount of $60,716.08 to be deducted from the extra selling price from such gold finished scales, leaving a net extra profit from such gold finished scales of $22,733.92, which amount should be deducted from the profits received for cylinder scales as found above in finding number 39.

49. That the total amount to be deducted from profits received from the sale of cylinder scales by reason of the special price for the electric light equipment and gold finish, as herein above set forth, is the sum of $38,311.05, which amount deducted from the total profits of cylinder scales as above found in finding 39, leaves a balance of profits from the sale of such cylinder scales of $82,157.84.

50. That of the total profit of $82,157.84 on cylinder scales as above found, two per cent of such profits attributable to the special form of the indicating device in this case is the sum of $1,643.15.

51. That for various elements mentioned in finding 41 above other than the particular form of indicating device in platform, automatic, computing and weighing scales, such as are involved herein, the defendant owns various letters patent of the United States, to wit:

Reissue 12138, Adjustment for pendulum Counterforce system. (See p. 2713.)
667,652, Dash-pot, (p. 2663),
830,976, Dash-pot, (p. 2663),
839,736, Platform Cylinder Scale, (pp. 2251-2651),
1,142,165, Shock Absorber, (p. 2702),
1,166,128, Stirrup connection and Pendulum Mounting Adjustment, (p. 2676),

the first four of which patented devices were used in all cylinder scales manufactured by the defendant and the other two of such patented devices were used in a substantial portion of the cylinder scales so manufactured.

52. That for the electric light equipment in the scales so equipped the defendant owned letters patent of the United States, No. 1,068,616 (See p. 2694.)

53. That at the time the defendant began the manufacture of cylinder computing scales it had been engaged in the manufacture of so-called fan-type computing scales for more than five years (see testimony of Henry Theobald, p. 2224), which fan-type scales have been manufactured by said defendant, together with said cylinder scales, ever since, and that both of such types of scales have
1605 been made in the same factory by the same workmen, (see testimony of G. H. Mould, p. 514), of the same material (see testimony of O. C. Reeves, p. 2217) purchased by the same employes, (see testimony of W. L. Flaherty, p. 2501), that many of the parts are interchangeable between cylinder and fan scales, (see testimony of O. C. Reeves, p. 2217), and that such cylinder and fan scales have

been sold by the same selling agents. (See testimony of D. H. Kelly, p. 499-500.)

Filed March 26—18.
C. B. MORRISON,
Master.

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. 30024.

THE COMPUTING SCALE COMPANY

vs.

TOLEDO COMPUTING SCALE COMPANY.

Objections of Defendant to Master's Draft of Report.

Filed Mar. 26, 1918.

The defendant objects to the draft of the report of the Master in the following particulars:

1. That said report includes profits found by the Master which have been earned by the defendant before March 8, 1911, at which time the defendant first began the manufacture and sale of scales equipped with drums containing spiders made of aluminum or other light material; the defendant, therefore, requests the Master to find and deduct from the amounts found due to said plaintiff in said draft of his report any amounts earned by the manufacture and sale of cylinder scales prior to said March 8, 1911.

2. For that said Master, in and by said draft, has failed to make any finding of the total profits realized by the defendant in its business during the accounting period, and has failed thereafter to make a division of these profits as between fan and cylinder scales on the basis of sales, and defendant, therefore, requests the Master to make such finding and division.

3. For that said Master in and by said draft of said report, has failed to find that all of the infringing cylinder scales made and sold by the defendant included the feature of the so-called front-
1606 and-back indication which was the subject matter of patent No. 597,300 sued on herein, and that such feature constituted a valuable constituent part of such scales and contributed to the profits realized from the sales thereof, and that said master has allowed to the defendant no portion of such profits, and defendant, therefore, requests the master to make such finding and allowance.

4. For that said draft of said report is based upon a ruling of said master with reference to the defendant's offer to prove by the depositions of Thomas Z. Phinney, John H. Devlin, Charles H. Tierney,

E. Willard Horton, Joseph McNally, Daniel C. Fallon, William H. Gillan, Orwell C. Reeves, William L. Flaherty and Edward J. Lindow, offered in evidence by the defendant, but which were not admitted in evidence by the master, the existence and character of the scale known as the "Phinney Scale" equipped with drums containing wooden spiders as a scale which was open to the public to use at and before the time of the invention of the patent in suit herein and as a scale constituting a comparison whereby the true profits due to the patented invention might be ascertained with reasonable accuracy, and defendant, therefore, requests the master to admit in evidence such depositions and the exhibits returned therewith and forming part thereof and to consider the same in his report and to find that in view thereof the plaintiff is enti-led merely to the difference between the costs of drums equipped with metal spiders such as are covered by plaintiff's patent and the costs of drums equipped with wooden spiders such as used in the Phinney scales, which difference is shown by the depositions and exhibits in questoin to be the sum of thirty-one and eighty-one one hundredths cents per scale.

5. For that such report is based upon a ruling by which said master refused to inspect and consider in evidence the exhibit offered by said defendant and known as "Toledo Exhibit" Number 1 which was returned with the depositions of Orwell C. Reeves, William L. Flaherty and Edward J. Lindow, such scale being a cylinder equipped with a drum containing wooden spiders such as were open to the use of the public, including the defendant, during the accounting period.

6. For that said Master, in and by said draft of such report, allows to said plaintiff profits upon a device known as an electric lighting attachment which was attached to certain of defendants scales, the number of which were shown by the record, and the addi-
1607 tional profit accruing to said defendant by the manufacture and sale of such additional equipment being specifically shown in the record, and the defendant, therefore, requests the master to find the amount of such additional profits in his report and to deduct such amount from the sum heretofore allowed by him to the plaintiff herein.

7. For that said master, in and by the draft of said report, allows to said plaintiff profits accruing to said defendant by reason of the peculiar and special finish upon certain of the cylinder scales manufactured and sold by it, which finish was known as the "Gold Finish," the amount of which additional and special profit upon such scales was specifically shown in the record, and the defendant, therefore, requests the master to find the amount of such special profit due to such "Gold Finish" and to deduct such amount from the sum heretofore allowed by him to the plaintiff herein.

8. For that said master in such report has failed to allow to the defendant as a credit litigation expense shown on the books of said defendant and necessary and usual in the course of its business, and defendant, therefore, requests the master to allow such credit for the items aforesaid.

9. For that said master in such report has failed to allow to the defendant as a credit patent expense shown on the books of said defendant and necessary and usual in the course of its business, and defendant, therefore, requests the master to allow such credit for the items aforesaid.

10. For that said Master in said report has failed to allow to the defendant as a credit expenses shown in the experimental account on the books of said defendant and necessary and usual in the course of its business, and defendant, therefore, requests the master to allow such credit for the items aforesaid.

11. For that said master has nowhere in such report allowed to the defendant as a credit losses by it sustained by reason of the depreciation in value of its patents, and defendant, therefore, requests the master to allow such credit for the items aforesaid.

12. For that said master has found that the information upon which the witness, William A. Zolg, based his cost figures for the period from March 8, 1911, to August 31, 1912, for the costs of direct labor and material was obtained by him during the many years he was in charge of the Accounting Department, whereas the record shows that such information was obtained by him only after the master had ordered the accounts herein, and was obtained
1608 from the factory superintendent, and was a matter of which said Zolg had no first hand knowledge.

13. For that said Master has found that the connection of the witness Zolg with the Toledo Company renders it practically certain that the cost figures furnished by him are not unfair to that company, whereas the testimony and documentary evidence adduced in the case show that such cost figures are too small in amount and erroneous and were furnished to said witness by others and were submitted by such witness just as he received them and without knowledge on his part as to their inaccuracy.

14. For that said master has found that the cost of labor and material did not vary materially during the accounting period, and upon such assumption, has fixed the manufacturing costs of cylinder scales in that portion of the accounting period other than that from March 8, 1911, to August 31, 1912, upon the same basis as in the period last mentioned, whereas there is no evidence in the record to support such an assumption.

15. For that said master has found in table G in his said report certain amounts under the caption "Factory Overhead" as part of the cost of manufacture of the infringing scales, which amounts are too low by reason of the fact that the base figures for direct labor and material used by the master to obtain the proportionate share of total factory overhead chargeable to cylinder scales were in themselves too low.

16. For that said report is based upon rulings of said master wherein he refused to receive in evidence the testimony of the wit-

ness O. C. Reeves and the cost sheets of the defendant most closely related to the accounting period in time and the nature of scales concerned in which costs were shown, in order to have a basis of comparison of such estimated costs as between fan and cylinder scales and thus to determine how much difference and shortage there was between the amount of estimated costs and actual costs as shown on the books so as to divide the amount of such shortage between fan and cylinder scales upon an equitable basis, such estimated cost sheets being the source from which the information as to direct labor and material costs was furnished to the witness, William A. Zolg, as to cylinder scales.

17. For the said report is based upon assumptions of the master as to manufacturing costs, which assumptions were not founded upon evidence in the cause, and that said master has refused to 1609 reopen the taking of testimony in such cause for the purpose of taking the testimony of F. S. Johnson and E. Rouse, as requested by the defendant, in order to determine the amount of manufacturing cost of fan scales for the year 1905 and subsequent years, and thus to be able to fix the manufacturing costs of cylinder scales for the accounting period.

18. For that said master did not find the commissions paid by the defendant and the charge upon its sales of cylinder scales for the year 1911 to be the amount found by the accountants for the defendant and shown in the record by the testimony of such accountants; defendant, therefore, requests the master to make such finding.

19. For that said master has found that the books of the defendant were kept without any effort to distinguish between fan and cylinders as to allowances, and that the great number of transactions that had to be analyzed renders it uncertain whether the allocation made by the defendant's accountants would produce reasonably accurate results, whereas the evidence discloses that the books of the defendant, and particularly the customers' Ledger Accounts, showed whether any particular allowance was made upon a fan or a cylinder scale, and the accountants of the defendant for the year 1911 by reference to each of such accounts allocate One Hundred and Seventeen Thousand Eight Hundred and Eighty-five Dollars and Six Cents ($117,885.06) of such allowances as directly chargeable to cylinder scales, which evidence the master has wholly and without warrant disregarded upon the assumption that the accountants could not analyze and allocate such items within the time at their disposal, although there is no evidence in the record in support of such assumption.

20. For that said Master has found the allowances made from the purchase price of cylinder scales as per table M of such report, and has failed to find that in the year 1911 the amount of such allowances, as specifically allocated as shown by the testimony of W. E. Seatree and J. A. Bowman and Defendant's Exhibit 21, was the sum of One Hundred and Seventeen Thousand Eight Hundred and Eighty-five Dollars and Six Cents $117,885.06) instead of Ninety Thousand Seven Hundred and Seventeen Thousand Dollars and

Seventy-four Cents ($90,717.74) as found by the Master, and that the allowance for the other years of such accounting period
1610 are shown by the testimony of W. E. Seatree. The defendant, therefore, requests the master to make such corrections and findings.

21. For that said Master has, in and by the draft of such report, having failed to allow to said defendant any credit for the items in patent expense and experimental accounts during the accounting period, also failed to allow to said defendant any interest upon the amounts shown in the record as invested by the defendant in the patent and experimental work at the commencement of and during the accounting period. The defendant, therefore, requests the master to find the amount of such expenditures and to divide the same pro rata between fan and cylinder scale business, and to allow to said defendant interest thereon.

22. For that said Master has, in and by the draft of such report, failed to allow to said defendant any amount for losses by it sustained during the accounting period for depreciation in value of its patents from time to time by reason of the pro rata shortening or lessening of the time for which such patents would continue in force and effect, and defendant requests the master to find the amount of such loss, and to divide said amount between fan and cylinder scale business upon an equitable basis and to reduce the amount of profits for such cylinder scale business by him heretofore found by the amount so ascertained.

23. For that said master has, in and by the draft of such report, charged to the defendant and allowed to the plaintiff certain items of expense in the Canadian business by comparing the total amount of sales in the United States and Canada with the amount of such sales in Canada, which method of comparison and division is unfair to the defendant by reason of the difference in the conditions surrounding such sales.

24. For that, in and by said report, said Master has failed to find what elements were embodied in the cylinder scales in question other than the infringing drums or cylinders, and the defendant, therefore, requests the Master to make such finding.

25. For that, in and by said report, said Master has failed to find that certain patent devices covered by Letters Patent owned by the defendant and shown by the evidence in the cause were embodied in the cylinder scales manufactured and sold by the defendant, and the defendant, therefore, requests the Master to make such finding.

26. For that, in and by said report, said Master has found
1611 that the elements in the cylinder scales in question other than the infringing drums were old and open to the public, and none of them, if separated from the structure of which it is a part, would in itself be a useable or workable tool, which finding is not supported by the evidence in the cause.

27. For that, in and by said report, the said Master has found that the uncontradicted testimony of Dr. Reichmann and others of defendant's witnesses as to the relative value of different parts of the complete machine known as the cylinder scale in question was not helpful in an effort to determine whether all or only a portion of the profits on the sales of such scales was due to the patent in question.

28. For that said Master has found that the evidence in the case was not sufficient to establish any portion of the profits is due to causes other than the patent in suit.

29. For that said draft of said report is based upon a ruling by said Master in which said Master refused to allow the witness John L. Theobald, called on behalf of the defendant, to testify as to what were the talking points upon which the defendant sold the cylinder scales in question, and because said Master refused to allow said witness to answer such questions.

30. For that the said Master, in and by the draft of said report, has awarded all the profits on the scales containing the infringing devices to the complainant, whereas the invention in issue relates to a segregable part thereof, and whereas plaintiff has adduced no evidence that the salability of the entire scale is due to said invention, and defendant, therefore, requests the master to apportion the profits reasonably and legally attributable to such part of said scales.

31. For that, in and by the draft of said report, said Master has found that there was no evidence that the salability of said cylinder scales was due to causes other than the indicator drum in issue, whereas he should have shown, and the defendant requests that he do find, that the sales of the infringing scales were due to the employment of parts or features other than such indicator drum, such as pendulum system, the platform construction of scale, the honest chart, the front and rear indication, the dash-pot, the leveling device, the electric light attachment, the Gold Finish, the slogan of "No Springs—Honest Weight."

32. For that in said draft of said report said Master has failed to find that those parts of the defendant's infringing scale in addition to the indicator drum in suit, has value independent of their
1612 association with the indicator drum, inasmuch as other forms of indicating mechanism which did not embody the invention in issue could be substituted for the indicator drum in said infringing scales; defendant, therefore, requests the Master to make such finding, and to allow to said defendant the value of such additional parts.

33. For that said Master has refused to receive in evidence testimony and documentary evidence offered by the defendant and shown in the record in this cause, and has received in evidence testimony and documentary evidence offered by the plaintiff against the objections of the defendant.

34. For that said Master has found that the plaintiff is entitled to a decree against the defendant for the sum of Four Hundred and Four Thousand One Hundred and One Dollars and Ninety-seven Cents ($404,101.97).

TOLEDO COMPUTING SCALE COMPANY,
By RECTOR, HIBBEN, DAVIS & MACAULEY AND
ALBERT H. MEADS,
Its Solicitors.

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

THE COMPUTING SCALE COMPANY

v.

TOLEDO COMPUTING SCALE COMPANY.

Objections and Exceptions of the Computing Scale Company, Plaintiff, Taken to the Report of Honorable Charles B. Morrison, Master in Chancery, in the Above Case.

Filed March 26-1918.
C. B. MORRISON,
Master.

1613 In the District Court of the United States for the Northern District of Illinois, Eastern Division.

THE COMPUTING SCALE COMPANY

v.

TOLEDO COMPUTING SCALE COMPANY.

Objections and Exceptions of the Computing Scale Company, Plaintiff, Taken to the Report of Honorable Charles B. Morrison, Master in Chancery, in the Above Case.

Filed Mar. 26, 1918.

Now comes the plaintiff, The Computing Scale Company, and makes its several objections to the Report of the Master in Chancery herein, and excepts to the said Master's Report severally on the following grounds:

A.

Preliminary Recitals.

I.

For that the Master has not found that the witness William A. Zolg, produced by the defendant for examination, was examined by plaintiff's counsel on February 5, 1915, and on February 13, 1915 counsel for plaintiff asked leave to examine the books, papers and documents of the defendant, which motion was allowed by the Master, and thereupon the said books of the defendant were examined by accountants of the plaintiff, and thereafter said witness Zolg and other witnesses were examined by plaintiff at Toledo, Ohio, and the objection to the account filed by defendant was not again called to the Master's attention for the reason that plaintiff's accountants had prepared an account from the books and papers of the defendant.

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B.

Infringing Scales.

II.

For that the Master has not found that the scale marked "Complainant's Exhibit Defendant's Scale" held by the Circuit Court of Appeals in this case to be infringing, was a scale with steel spiders and made by the defendant prior to, and shipped and sold by the defendant on, the 10th day of April, 1908, and that the contention of the defendant that the defendant was not required to account for drum scales prior to March, 1911, is precluded by the decision of the Circuit Court of Appeals in this case.

C.

Commissions.

III.

For that the Master has found that excess allowances made by agents were charged against commissions in the Commissions Account, and has not found that, as shown by the evidence the excess allowances made by agents of defendant did not affect the Commissions Account, and that where an agent made an excessive allowance for scales taken in exchange, such excess of allowance, while charged to the agent in his account, was not entered to the credit of commissions in General Commissions Account for the reason that only the correct commissions as calculated by the Company, were entered in the Commissions Account (See Record pp. 64, 70,

24, 232, 922, 923, 940, 368, 180, 178, 2029, 2110, 415, 416), and r that the Master has found that the witness Zolg reported in de- ndant's account commissions less deductions for agents' excess llowances and did not report the commission that the agent was ntitled to.

D.

Interest on Investment.

IV.

For that the Master has found that it is not disputed that the defendant is entitled to a credit for interest on its investment 1615 in the business, and has not found that the plaintiff disputes that defendant is entitled to interest on investment, since plaintiff claims that no ascertainable investment for the production of cylinder scales is shown by the evidence and has admitted that there should be an apportionment of interest actually paid on the basis of net sales as an expense.

V.

For that the Master has found that during the accounting period the defendant is entitled to charge against profits on cylinder scales interest on investment found by taking the valuations of the tangible assets of the defendant and excluding therefrom patents and Good Will, and apportioning that total interest so found to cylinder scales in the respective years on the basis of gross sales. The plaintiff excepts thereto on the grounds that the method of ascertaining the whole investment is incorrect and the method of ascertaining investment for cylinder scale production is incorrect, for there is no proof in the record that any part of any alleged investment was caused by, or rendered necessary by, cylinder scale business, and any apportionment should be on the basis of net sales which alone produce revenue to pay interest, and the Master, by reducing the interest charge against scales made by the defendant other than cylinder scales, has allowed defendant to obtain a positive benefit from the infringing business by charging interest on part of its existing investment against the profits from infringing scales, and thereby has relieved scales other than infringing of a part of the interest charge that they would have been compelled to bear if the infringing business had not been begun.

VI.

For that the Master has found that in the year 1906 interest on the investment is chargeable at $18,102.00, of which 1.09%, being $197.31, is chargeable to cylinder scales on an investment of $362,040.00; and for that the Master has not found that the said investment of $362,040.00 was excessive and was made and in existence

for, and was already necessary to the production of scales then being made by defendant other than cylinder scales before the infringing business began, and that the evidence does not show that any part of said investment was rendered necessary by the production of cylinder scales; and for that the Master has not found that the interest chargeable for the year 1906 was interest as shown by the
1616 books of defendant amounting to $4,585.41 actually paid on the whole business, of which 1.14%, being $52.07, is chargeable against cylinder profits.

VII.

For that the Master has found that the interest charge on investment in the year 1907 is $21,161.00 on an investment of $423,220.00, of which 25.30% is chargeable to cylinder sales, being $5,353.73; and for that the Master has not found that the said investment of $423,220.00 was excessive, and that the evidence does not show any part of said investment to have been caused by the production of cylinder scales; and for that the Master has not found that the interest charge for the year 1907 was $5,629.32 interest actually paid on the whole business according to defendant's books, of which 26%, being $1,466.62, was chargeable against profits on cylinder scales.

VIII.

For that the Master has found that the interest charge for the year 1908 is $27,591.00 on an investment of $551,821.00, of which 50.83%, being $14,024.50, is chargeable against cylinder sales; and for that the Master has not found that said investment was excessive, and that the evidence does not show that any part of said investment of $551,820.00 was rendered necessary by the production of cylinder scales; and for that the Master has not found that the interest chargeable in the year 1908 is $976,186.00, interest shown by the books of the defendant as actually paid on the whole business, of which 51.66%, being $4,996.48, is chargeable against cylinder sales.

IX.

For that the Master has found that the interest charge for the year 1909 is $31,730.00 on an investment of $634,600.00, of which 49.58%, being $15,731.73 is chargeable against cylinder sales; and for that the said Master has not found that the evidence shows that said investment of $634,600.00 was excessive, and that the evidence does not show that any part thereof was rendered necessary by the production of cylinder scales, and has not found that the interest charge for the year 1909 is $17,962.78, interest shown by the books of the defendant as actually paid on the whole business, of which 48.80%, being $8,765.84, is chargeable to cylinder sales.

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X.

For that the Master has found that the interest charge for the year 1910 is $47,500.00 on an investment of $950,000.00, of which 60.11%, being $28,552.25, is chargeable against cylinder scales; and for that the said Master has not found that the evidence shows that said investment of $950,000 was excessive, and that the evidence does not show that any part of it was rendered necessary by the production of cylinder scales; and for that the Master has not found that the interest charge for the year 1910 is $25,129.46, interest shown by the books as interest actually paid on the whole business, of which 59.46%, being $14,941.97, is chargeable to cylinder sales.

XI.

For that the said Master has found that the interest charge for the year 1911 is $50,000.00 on an investment of $1,000,000.00, of which 60.99%, being $30,495.00, is chargeable against cylinder sales; and for that the said Master has not found that the said investment is excessive, and that the evidence does not show that any part of said investment was rendered necessary by the production of cylinder scales; and for that the Master has not found that the interest charge for the year 1911 is $28,432.86, interest actually paid as shown by the books of defendant, of which 60.40%, being $17,173.42, is chargeable to cylinder sales.

XII.

For that the said Master has found that the interest charge for the year 1912 (8 mo.) is $33,333.00 on an investment of $1,000,000.00, of which 59.36%, being $19,786.66, is chargeable against cylinder sales; and for that the Master has not found that the evidence does not show that any part of said investment of $1,000,000.00 was rendered necessary by the production of cylinder scales, and has not found that the interest charge for the year 1912 (8 mo.) is $18,947.80, interest actually paid by the defendant, of which 58.46%, being $11,133.73, is chargeable against cylinder sales; and for that the Master has not found that the alleged increase in the investment of the defendant is shown by the books of defendant to have been made out of money borrowed on bills payable, and an allowance for interest actually paid, according to the sales, would therefore be entirely just.

1618 The difference between the total interest charge found by the Master and the charge that should be allowed for interest actually paid, is the difference between $114,141.18 and $58,510.13, which difference is $55,631.05, which should be added to profits of cylinder scales shown in the Master's Report.

E.

Canadian Business.

XIII.

For that the Master has found that the complainant is not entitled to any of the Canadian profit for the years 1908, 1909, 1910, 1911 and 1912 (8 mo.); and for that the Master has not found that all of the Canadian sales were made from Toledo, and in point of law were sales made in the United States where the invoicing and billing were made and all accounts of selling such scales were entered and carried, and collections therefor made; and for that the Master has not found that by reason of the fact that necessary parts of the infringing scales were made at Toledo and shipped from Toledo to the Assembling Factory in Canada for use, in point of law such fact renders all scales put together in Canada accountable for as if all made in the United States; and for that the Master has not found that the account as to such Canadian sales were inextricably mingled on the books of the defendant with the accounts as to United States sales, and that the whole of the Canadian profit on cylinder scales, shown by the books of the defendant to be $56,141.24, should be accounted for by the defendant as profits on infringing scales.

The deduction in the Master's Account for Canadian expenses in Commercial Overhead is $40,492.48, which leaves a difference of $15,648.76 to be added to the profits on cylinder scales as the actual profits.

F.

Second Hand Scales.

XIV.

For that the Master has not found that second hand scales taken in exchange for infringing scales sold were taken and accepted by defendant at the various values shown to make up the total 1619 of the Allowance Accounts, and that the defendant, as a Trustee, is bound to account to plaintiff for the values at which it took and accepted such second hand scales, either in money or in such scales at the option of the plaintiff, and that no part of the Allowance Accounts can be charged against Cylinder Scale Profits over the objection of the plaintiff. (See Jarrett v. Johnson, 216 Ill. 212; Jarrett v. Johnson, 116 Ill, App. 592.)

XV.

For that the Master has not found the defendants accountable for the valuations in cash of second hand scales as shown by the totals of the Allowance Accounts as the amounts in cash at which

e defendant acquired the exchange scales in exchange for property to which it was a Trustee for the plaintiff; and for that the Master has not added to profits for the infringing period the sums of 211.52 for 1906, $6,431.75 for 1907, $42,828.26 for 1908, $40,-96.26 for 1909, $60,268.50 for 1910, $90,717.74 for 1911, and 53,811.56 for 1912 (8 mo.), a total of $294,665.67.

If this be done second hand sales for the infringing period to the tal amount of $197,493.93 should be deducted therefrom, and a et addition to profits of $97,171.74 should be added to the profits ound in the Master's Report.

G.

Scales on Hand.

XVI.

For that the Master has found that plaintiff is not entitled to rofit upon 1839 cylinder scales on hand at the close of the accounting period; and for that the Master has not found that the plaintiff is entitled to have the defendant account for said 1839 scales t a profit of approximately $20 per scale, which amount of profit n scales on hand was $36,780.00, and should be added to the profits ound by the Master on cylinder scales.

XVII.

For that the Master has found that plaintiff is not entitled to any profit upon scales on hand at the end of the accounting period unless it is shown that the said scales on hand were afterwards sold 1620 and the profit actually realized by sales, and that profits under the law are ascertainable only by a sale; and for that the Master has not found that profit on an infringing article can be ascertained by the value of the infringing article at the time of the accounting over and above its cost of production, and that profits made in an established business shown by the evidence over the preceding years is a lawful measure of such profits; and for that the Master has not found that gains and advantages to the defendant are profits under the law, while losses to the plaintiff are damages under the law, and all gains and advantages to the infringer resulting from infringement whether by means of sales or in other ways, must be accounted for, and that the defendant must account under the head of Profits for every gain and advantage obtained by its infringement; that one of such gains and advantages was that at the end of the accounting period the defendant had on hand 1839 infringing scales which the evidence shows at that time to be worth $20 per scale over and above the cost of manufacture and sale, and that at that moment the defendant was the Trustee of the plaintiff for the said value of said scales over and above the cost of manufacture, and the defendant by retaining said scales appropriated said value

which thereby became a gain and advantage to the defendant for which it must account, and which value is ascertainable from the evidence and is in no sense speculative. (See Anvil M. Co. v. Humble, 153 U. S. 540; Central Coal Co. v. Hartman, 111 Fed. 96; Safety Insulating Wire Co. v. Baltimore, 66 Fed. 140.)

XVIII.

For that the Master has found that potential or prospective profits cannot be recovered; and for that — Master has not found that the evidence in the record shows a legal basis for estimating the profits on scales on hand and that the same rule applies as to profits in patent infringement accountings as in other cases where profits to be recovered are in question upon infringed articles on hand made by means of infringement during the accounting period.

XIX.

For that the Master has found that this suit has proceeded on the theory of recovering profits, and has not found that the record shows no waiver of damages and that the reference was to ascertain
1621 both profits and damages, and the evidence was not in any way limited when offered to profits alone; and for that the Master has not found that as to the scales on hand at the end of the accounting period the defendant was a Trustee for the plaintiff as to all the valuation in said scales then ascertainable under the evidence over and above the cost of manufacture, and that by the rules of law as damages against the converter of its property the plaintiff would be entitled to the selling price of such scales over and above the cost of production; that the plaintiff asks only for the selling price over and above the cost of manufacture and sale, which includes commissions and interest on investment and losses, which claim is far more favorable to defendant than the rule as to damages which is imposed by law, and if said amount of value in the scale is to be considered not as a gain or advantage to defendant but a loss or damage to plaintiff, plaintiff is entitled to the said sum as damages not covered by the profits allowed, but the expenses of which both in manufacturing and sale have been fully allowed for.

H.

Good Will.

XX.

For that the Master has found that the defendant is not required to account for the gain and advantage in Good Will of a business in infringing scales obtained by means of the continuous infringement of the defendant during the accounting period, which gain or advantage remained to the defendant at the end of the accounting period.

XXI.

For the Master has not found that the decree of this Court made
nd entered on the 25th day of June, 1912 granted a perpetual in-
unction against the defendant's making, using or vending any of
he infringing scales; that upon the petition of the defendant stat-
ng that the patent infringed would expire by limitation on Septem-
er 3, 1912, and that such injunction would irreparably damage the
efendant's business as a going concern, the said injunction was sus-
ended pending appeal by order of this Court made and entered on
the said 25th day of June, 1912, and that said defendant's
622 business in infringing scales continued without interruption
until and after September 3, 1912, when the patent expired
y limitation, and that the Good Will of said infringing business
emained to the defendant on said last named day as a valuable
sset obtained by the defendant by means of the expenditures prior
hereto during the accounting period, which expenditures had been
llowed to the defendant as charges against the profits on infringing
cales, and that a benefit, gain and advantage resulted to defendant
herefrom from the fact that the benefit of expenditures allowed to
efendant during the infringing period continued to the defendant
fter the accounting period expired by reason of the expiration of
he patent.

XXII.

For that the Master has not found that the patent having expired
efore a perpetual injunction was enforced the defendant obtained
s a gain from its infringement, a going business in scales theretofore
infringing, which going business had been established through the
infringement, the expenses of establishing which had been paid for
by its whole business, and the proportionate part of which had been
llowed as expenditures against infringing scales and against the
profits on the infringing business; that certain of such expenditures
llowed, namely advertising and branch office accounts, were expen-
ditures of which defendant would enjoy the benefit after the account-
ing period had expired, as shown by the evidence, and that as shown
by the evidence a fair method of allowing for some of the defend-
ant's said gain is to distribute such expenditures of permanent
benefit as advertising and branch offices, one-fifth to the year in
which the expenditure was made and one-fifth to each of the suc-
ceeding four years.

That as shown by the evidence the advertising expenses allowed
beginning with the year 1908 and through the rest of the account-
ing period were as follows, from which have been deducted the fol-
lowing amounts allowed for Canadian expenses, so as to show the
amounts of advertising expense actually allowed against the whole
business in scales sold in the United States:

1908.....	Advertising	$15,048.47	Deduct	1.17%	leaving	$14,872.39
1909.....	"	19,776.36	"	6.22%	"	18,546.28
1910.....	"	26,986.86	"	8.15%	"	24,787.43
1911.....	"	35,349.47	"	11.70%	"	31,213.59
1912 (8 mo.).....	"	23,173.49	"	12.01%	"	20,390.36

1623 Of these amounts the following percentages have been allowed against cylinder scale sales:

1908.....	$14,872.39	of which	charged	to	cylinders	50.83%.....	$7,559.63
1909.....	18,546.28	"	"	"	"	"	49.58%.....	9,195.25
1910.....	24,787.43	"	"	"	"	"	60.11%.....	14,897.72
1911.....	31,213.59	"	"	"	"	"	60.99%.....	19,037.15
1912 (8 mo.).	20,390.36	"	"	"	"	"	59.36%.....	12,103.72

This advertising expense distributed on the five-year basis would amount to the following sums, which should be carried over to the period succeeding the close of the accounting period, and therefore would be deducted from expenses allowed, or, what is the same thing, should be added to the profits found by the Master:

1908.....	$7,559.63	Carry over	1/15	thereof....	$503.97
1909.....	9,195.25	" "	4/15	"	2,452.07
1910.....	14,897.72	" "	7/15	"	6,953.20
1911.....	19,037.15	" "	10/15	"	12,691.43
1912 (8 m.)	12,103.72	" "	12/15	"	9,682.98
Total of advertising carried over.....					$32,283.65

Branch office expenses suffered no deduction for Canadian business, and there were charged against cylinder sales the following amounts, and the following amounts should be carried over to the period succeeding the accounting period:

1908.....	$43,911.03	50.83%	$22,319.97	1/15	thereof.....	$1,487.99
1909.....	57,902.22	49.58%	28,707.92	4/15	"	7,655.44
1910.....	83,157.90	60.11%	49,986.21	7/15	"	23,326.90
1911.....	115,166.00	60.99%	70,239.74	10/15	"	46,826.49
1912(8mo.)	66,654.29	59.36%	39,565.98	12/15	"	31,652.78
Total of branch office expenses carried over.....						$110,949.60

thus showing of total expenses to be carried over the sum of $143,233.25, for which the claim of defendant of an allowance of $100,000.00 is reasonable, and that amount of $100,000.00 should be added to cylinder scale profits as an allowance in part for expenses allowed in the preceding account and as an equivalent for part of the Good Will acquired by the infringement.

1624 I.

Total Profits.

XXIII.

For that the Master has not added to the total profits shown by his accounting the following amounts making the profits the following total:

Total profits shown by the Master	$404,101.97
Additional profits taken by excessive interest allowances	55,631.05
Additional profits on Canadian sales	15,648.76
Additional profits taken on exchange allowances	97,171.74
Additional profits or damages, scales on hand	36,780.00
Additional gain obtained by expense producing Good Will	100,000.00
Total profits	$709,333.52

J.

Division of Profits.

XXIV.

For that the Master has not found that irrespective of other questions there can be no division of profits in this case for the reason that the profits upon the whole infringing scale are shown by the evidence to be so inextricably mingled that it is impossible to find or ascertain any particular part of the profit to be attributable to any part of the infringing scale.

X.

Miscellaneous.

XXV.

The Master is asked to correct a typographical error in the first line of page 25 of his report, by changing "1911" to "1912."

XXVI.

The Master is asked to correct the inaccuracy in the statement that the repossessed scales were refinished or rebuilt. Scales never
1625 delivered were not so treated, and there is no evidence of a repossessed scale ever having been rebuilt. In some cases they were refinished.

XXVII.

The Master is asked to correct the words "the part of the scale covered by the patent" to the words "indicating device," as used by the witness on page 42 of the report on lines 21 and 22.

XVIII.

The Master is asked to correct on page 45 lines 2, 3 and 4, the statement "the plaintiff contends there should only be charged against cylinder scales such expense as the evidence may show was

added on account of the cylinder business" to the statement, "the plaintiff contends that there should be charged against cylinder scales as interest on investment, only the interest on such investment as the evidence shows was added on account of the cylinder scale business if any is shown."

ZANE, MORSE & McKINNEY,
Solicitors for Plaintiff.

Statement in re Accounting. Filed Jan. 15, 1915.

In re Accounting

THE COMPUTING SCALE COMPANY

vs.

TOLEDO COMPUTING SCALE COMPANY.

Filed Jan. 15-1915.
C. B. MORRISON,
Master.

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Summary of Scales Embodying Alleged Infringing Device and Selling Prices Thereof.

1911 Period.

Style No.	Quantity.	Selling price.	Total.
81	1	$75.00	$75.00
	2	90.00	180.00
	1	125.00	125.00
	1	135.00	135.00
	5		515.00
82	1	135.00	135.00
181	1	90.00	90.00
182	2	90.00	180.00
183	3	74.38	223.14
	1	140.00	140.00
	4		363.14
186	1	120.00	120.00
345	27	28.60	772.20
	2	50.00	100.00
	4	90.00	360.00
	3	95.00	285.00
	12	100.00	1,200.00
	3	105.00	315.00
	8	110.00	880.00
	18	115.00	2,070.00
	1	125.00	125.00
	1	126.66	126.66
	4	130.00	520.00
	1	132.00	132.00
	1	135.00	135.00
	31	140.00	4,340.00
	1	145.00	145.00
	9	150.00	1,350.00
1627	126		$12,855.86
	(1)		
346	1	$75.00	$75.00
	1	80.50	80.50
	1	85.00	85.00
	1	100.00	100.00
	2	105.00	210.00
	2	110.00	220.00
	2	115.00	230.00
	1	125.00	125.00
	7	140.00	980.00
	1	150.00	150.00
	19	.....	$2,255.50

Style No.	Quantity.	Selling price.	Total.
347	1	75.00	75.00
	2	98.34	186.68
	6	100.00	600.00
	3	105.00	315.00
	5	110.00	550.00
	4	115.00	460.00
	1	120.00	120.00
	5	125.00	625.00
	3	130.00	390.00
	3	135.00	405.00
	2	137.50	275.00
	10	140.00	1,400.00
	1	165.00	165.00
	1	185.00	185.00
	47	.....	5,751.68
349	1	140.00	140.00
381	11	50.00	550.00
	4	51.66	206.64
	2	60.00	120.00
	1	71.00	71.00
	13	74.00	962.00
	2	75.00	150.00
	1	80.00	80.00
	3	85.00	255.00
	1	90.00	90.00
	1	90.75	90.75
	2	95.00	190.00
	26	100.00	2,600.00
	5	105.00	525.00
1628 (2)			
381	1	102.25	105.25
	1	105.50	105.50
	1	106.00	106.00
	2	106.25	212.50
	1	108.00	108.00
	43	110.00	4,730.00
	3	112.73	338.19
	17	115.00	1,955.00
	1	115.50	115.50
	1	115.62	115.62
	1	115.78	115.78
	1	115.80	115.80
	1	116.62	116.62
	1	116.75	116.75
	46	120.00	5,520.00
	1	121.05	121.05
	1	121.25	121.25

Style No.	Quantity.	Selling price.	Total.
381.....	1	122.00	122.00
	1	122.50	122.50
	1	123.00	123.00
	2	124.00	248.00
	72	125.00	9,000.00
	1	126.25	126.25
	5	126.30	631.50
	3	129.00	387.00
	18	130.00	2,340.00
	52	135.00	7,020.00
	1	136.00	136.00
	1	136.66	136.66
	1	137.50	137.50
	22	140.00	3,080.00
	1	142.50	142.50
	5	145.00	725.00
	1	147.00	147.00
	4	147.50	590.00
	32	150.00	4,800.00
	2	155.00	310.00
	1	158.50	158.50
	84	160.00	13,440.00
	1	165.00	165.00
	8	170.00	1,360.00
	1	195.00	195.00
	516		65,652.61
1629	(3)		
382.....	1	45.00	45.00
	2	50.00	100.00
	4	60.00	240.00
	2	75.00	150.00
	1	90.00	90.00
	1	94.25	94.25
	1	97.00	97.00
	6	100.00	600.00
	1	105.00	105.00
	1	110.00	110.00
	4	115.00	460.00
	2	120.00	240.00
	6	125.00	750.00
	7	130.00	910.00
	5	135.00	675.00
	7	140.00	980.00
	1	148.75	148.75
	2	150.00	300.00
	1	155.00	155.00

Style No.	Quantity.	Selling price.	Total.
382	1	156.67	156.67
	1	158.33	158.33
	2	160.00	320.00
	17	165.00	2,805.00
	1	168.75	168.75
	19	175.00	3,325.00
	96		13,183.75
383	11	20.00	220.00
	1	30.00	30.00
	3	35.00	105.00
	4	40.00	160.00
	1	41.25	41.25
	5	48.00	240.00
	20	48.75	975.00
	23	50.00	1,150.00
	1	55.00	55.00
	1	60.00	60.00
	1	61.00	61.00
	1	65.00	65.00
	1	67.50	67.50
	1	68.33	68.33
1630	8	71.49	571.92
	1	72.00	72.00

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383	2	74.00	148.00
	2	78.33	156.66
	7	80.00	560.00
	18	85.00	1,530.00
	2	90.00	180.00
	2	91.00	182.00
	6	92.50	555.00
	2	93.75	187.50
	7	95.00	665.00
	1	96.63	96.63
	1	97.00	97.00
	1	98.00	98.00
	15	100.00	1,500.00
	8	105.00	840.00
	2	107.50	215.00
	18	110.00	1,980.00
	8	112.50	900.00
	1	113.70	113.70
	12	115.00	1,380.00
	1	116.75	116.75
	2	117.50	235.00

Style No.	Quantity.	Selling price.	Total.
383	2	118.42	236.84
	25	120.00	3,000.00
	1	120.09	120.09
	3	121.66	364.98
	2	122.50	245.00
	1	123.00	123.00
	3	123.30	369.90
	38	125.00	4,750.00
	1	126.75	126.75
	2	127.50	255.00
	6	128.25	769.50
	1	129.25	129.25
	1	129.50	129.50
	16	130.00	2,080.00
	1	131.25	131.25
	2	132.00	264.00
	2	132.50	265.00
	2	134.25	268.50
	39	135.00	5,265.00
1631	1	137.00	137.00
	1	138.00	138.00
	23	140.00	3,220.00
	1	141.75	141.75
	1	142.50	142.50
	5	143.33	716.65

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383	43	145.00	6,235.00
	3	147.50	442.50
	1	148.00	148.00
	62	150.00	9,300.00
	2	152.50	305.00
	17	155.00	2,635.00
	3	156.66	469.98
	2	157.89	315.78
	1	158.00	158.00
	57	160.00	9,120.00
	7	165.00	1,155.00
	2	167.50	335.00
	1	169.25	169.25
	12	170.00	2,040.00
	1	173.00	173.00
	1	173.33	173.33
	7	175.00	1,225.00
	3	180.00	540.00
	90	185.00	16,650.00
	1	187.50	187.50

Style No.	Quantity.	Selling price.	Total.
383	33	195.00	6,435.00
	3	200.00	600.00
	4	225.00	900.00
	737		98,780.04
384	6	25.00	150.00
	1	50.00	50.00
	1	60.00	60.00
	1	70.00	70.00
	4	75.00	300.00
	2	80.00	160.00
	1	87.50	87.50
	1	95.00	95.00
	6	100.00	600.00
	2	110.00	220.00
1632	1	111.75	111.75
	2	117.50	235.00
	1	120.00	120.00
	2	121.50	243.00
	1	122.00	122.00
	2	125.00	250.00
	2	130.00	260.00
	1	132.00	132.00
	1	133.25	133.25
	4	135.00	540.00
	10	140.00	1,400.00
	1	145.00	145.00
	1	149.57	149.57

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384	15	150.00	2,250.00
	3	155.00	465.00
	2	157.91	315.82
	2	158.00	316.00
	13	160.00	2,080.00
	2	162.50	325.00
	11	165.00	1,815.00
	2	169.50	339.00
	3	170.00	510.00
	12	175.00	2,100.00
	1	178.33	178.33
	2	180.00	360.00
	5	190.00	950.00
	23	200.00	4,600.00
	1	210.00	210.00
	1	220.00	220.00
	152		22,668.22

Style No.	Quantity.	Selling price.	Total.
385	1	21.66	21.66
	2	60.00	120.00
	2	75.00	150.00
	8	82.73	661.84
	1	85.00	85.00
	2	100.00	200.00
	2	105.00	210.00
	1	106.67	106.67
	1	110.00	110.00
	2	115.00	230.00
1633	2	121.67	243.34
	1	127.50	127.50
	13	130.00	1,690.00
	3	140.00	420.00
	41		4,376.01
387	1	65.00	65.00
	1	100.00	100.00
	1	125.00	125.00
	2	130.00	260.00
	1	135.00	135.00
	2	143.33	286.66
	1	152.00	152.00
	5	155.00	775.00
	1	175.00	175.00
	15		2,073.66

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581	1	65.00	65.00
	1	70.00	70.00
	1	73.50	73.50
	5	75.00	375.00
	1	76.50	76.50
	2	78.10	156.20
	7	80.00	560.00
	6	84.18	505.08
	14	85.00	1,190.00
	1	85.25	85.25
	1	87.50	87.50
	11	90.00	990.00
	1	90.52	90.52
	1	91.67	91.67
	2	92.00	184.00
	5	92.50	462.50
	11	95.00	1,045.00
	88	100.00	8,800.00
	1	102.00	102.00

Style No.	Quantity.	Selling price.	Total.
581	2	102.50	205.00
	6	105.00	630.00
	1	106.00	106.00
	4	107.50	430.00
	21	110.00	2,310.00
1634			
	1	112.50	112.50
	3	115.00	345.00
	1	115.79	115.79
	1	116.67	116.67
	2	120.00	240.00
	1	120.25	120.25
	119	125.00	14,875.00
	1	130.00	130.00
	7	135.00	945.00
	8	140.00	1,120.00
	1	150.00	150.00
	339		36,960.93

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583	1	25.00	25.00
	3	75.00	225.00
	1	85.00	85.00
	1	95.00	95.00
	8	100.00	800.00
	2	101.25	202.50
	1	104.00	104.00
	1	105.00	105.00
	3	110.00	330.00
	4	115.00	460.00
	4	120.00	480.00
	8	125.00	1,000.00
	1	133.00	133.00
	1	140.00	140.00
	6	150.00	900.00
	1	165.00	165.00
	1	185.00	185.00
	47		5,434.50
585	1	70.00	70.00
	1	80.00	80.00
	2	85.00	170.00
	1	90.00	90.00
	22	100.00	2,200.00
	26		2,610.00

Style No.	Quantity.	Selling price.	Total.
587	1	125.00	125.00

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1635 1912 Period.

81	1	55.00	55.00
	1	60.00	60.00
	1	70.00	70.00
	8	80.00	640.00
	1	84.00	84.00
	8	85.00	680.00
	10	90.00	900.00
	1	100.00	100.00
	1	120.00	120.00
	32		2,709.00
82	1	62.50	62.50
	2	65.00	130.00
	2	70.00	140.00
	1	75.00	75.00
	7	80.00	560.00
	3	85.00	255.00
	1	90.00	90.00
	17		1,312.50
83	1	80.00	80.00
181	1	85.00	85.00
	1	110.00	110.00
	2		195.00
345	2	25.00	50.00
	1	38.00	38.00
	1	40.00	40.00
	1	60.00	60.00
	2	75.00	150.00
	1	80.00	80.00
	1	82.00	82.00
	1	87.50	87.50
	5	90.00	450.00
	3	95.00	285.00
	28	100.00	2,800.00
	5	105.00	525.00
1636	1	107.50	107.50
	3	110.00	330.00

Style No.	Quantity.	Selling price.	Total.
345	2	110.50	221.00
	2	112.50	225.00
	19	115.00	2,185.00
	(10)		
345	1	118.00	118.00
	15	120.00	1,800.00
	8	125.00	1,000.00
	1	133.00	133.00
	2	135.00	270.00
	39	140.00	5,460.00
	7	150.00	1,050.00
	3	160.00	480.00
	154		18,027.00
346	1	125.00	125.00
347	1	85.00	85.00
	1	90.00	90.00
	1	100.00	100.00
	2	105.00	210.00
	1	110.00	110.00
	1	115.00	115.00
	2	125.00	250.00
	1	130.00	130.00
	4	135.00	540.00
	2	140.00	280.00
	2	150.00	300.00
	2	165.00	330.00
	20		2,540.00
381	1	5.00	5.00
	1	45.00	45.00
	1	46.00	46.00
	7	50.00	350.00
	1	65.00	65.00
	1	75.00	75.00
	2	80.00	160.00
	6	85.00	510.00
	1	87.50	87.50
1637	5	90.00	450.00
	2	95.00	190.00
	29	100.00	2,900.00
	6	105.00	630.00
	3	105.25	315.75
	2	105.50	211.00

Style No.	Quantity.	Selling price.	Total.
381	36	110.00	3,960.00
	14	115.00	1,610.00
	1	160.00	116.00
	1	116.50	116.50
(11)			
381	35	120.00	4,200.00
	1	121.75	121.75
	1	123.25	123.25
	48	125.00	6,000.00
	1	126.00	126.00
	1	126.30	126.30
	1	126.32	126.32
	2	128.00	256.00
	31	130.00	4,030.00
	1	131.25	131.25
	2	131.57	263.14
	1	131.58	131.58
	2	132.50	265.00
	3	133.33	399.99
	2	134.25	268.50
	61	135.00	8,235.00
	1	136.25	136.25
	20	140.00	2,600.00
	2	142.50	285.00
	1	143.00	143.00
	28	145.00	4,060.00
	21	150.00	3,150.00
	1	152.75	152.75
	2	155.00	310.00
	2	157.89	315.78
	65	160.00	10,400.00
	51	170.00	8,670.00
	11	180.00	1,980.00
1638	518		69,049.61
382	1	105.00	105.00
	1	105.25	105.25
	3	110.00	330.00
	1	115.00	115.00
	1	120.00	120.00
	1	126.75	126.75
	3	130.00	390.00
	1	133.50	133.50
	1	135.00	135.00
	6	140.00	840.00

Style No.	Quantity.	Selling price.	Total
382	2	150.00	300.00
	1	155.00	155.00
	1	158.00	158.00
	1	160.00	160.00
	9	165.00	1,485.00
	3	175.00	525.00
	9	185.00	1,665.00
	45		6,848.50

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383	1	10.00	10.00
	1	25.00	25.00
	2	40.00	80.00
	1	45.00	45.00
	4	50.00	200.00
	1	55.00	55.00
	2	60.00	120.00
	4	63.63	254.52
	1	65.00	65.00
	2	67.50	135.00
	6	70.00	420.00
	6	75.00	450.00
	8	76.25	610.00
	1	78.00	78.00
	1	82.50	82.50
	2	83.00	166.00
	3	83.75	251.25
	4	85.00	340.00
	1	86.75	86.75
	13	87.50	1,137.50
	5	90.00	450.00
	2	90.91	181.82
	2	92.11	184.22
1639	1	92.50	92.50
	9	95.00	855.00
	2	97.50	195.00
	38	100.00	3,800.00
	11	100.66	1,107.26
	12	105.00	1,260.00
	2	108.50	217.00
	9	110.00	990.00
	1	111.25	111.25
	4	112.50	450.00
	1	113.75	113.75
	8	114.50	916.00
	1	114.70	114.70
	18	115.00	2,070.00

Style No.	Quantity.	Selling price.	Total.
383.....	9	116.56	1,049.04
	25	120.00	3,000.00
	2	122.50	245.00
	22	125.00	2,750.00
	14	130.00	1,820.00
	2	130.87	261.74
	1	131.25	131.25
	3	132.50	397.50
	1	133.00	133.00
	32	135.00	4,320.00
	1	136.57	136.57

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383.....	3	137.50	412.50
	30	140.00	4,200.00
	3	141.66	424.98
	1	142.10	142.10
	4	142.50	570.00
	2	142.75	285.50
	2	143.00	286.00
	58	145.00	8,410.00
	1	146.75	146.75
	5	147.50	737.50
	1	148.33	148.33
	2	148.50	297.00
	1	149.38	149.38
	82	150.00	12,300.00
	1	154.15	154.15
	39	155.00	6,045.00
	2	157.50	315.00
1640	2	158.50	317.00
	1	159.78	159.78
	68	160.00	10,880.00
	1	161.66	161.66
	27	165.00	4,455.00
	1	166.66	166.66
	5	167.50	837.50
	1	168.50	168.50
	1	169.00	169.00
	1	169.50	169.50
	29	170.00	4,930.00
	4	171.66	686.64
	2	172.50	345.00
	1	174.83	174.83
	12	175.00	2,100.00
	1	179.00	179.00
	11	180.00	1,980.00
	1	181.66	181.66

Style No.	Quantity.	Selling price.	Total.
383	1	184.83	184.83
	44	185.00	8,140.00
	2	190.00	380.00
	86	195.00	16,770.00
	2	200.00	400.00
	22	205.00	4,510.00
	1	207.00	207.00
	2	215.00	430.00
	868		12,607.87

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384	17	$50.00	$850.00
	1	60.00	60.00
	1	80.00	80.00
	1	85.00	85.00
	1	95.00	95.00
	1	97.50	97.50
	2	100.00	200.00
	2	105.00	210.00
	5	110.00	550.00
	2	120.00	240.00
	1	122.90	122.90
	1	124.75	124.75
	8	125.00	1,000.00
	2	130.00	260.00
1641	1	132.00	132.00
	1	132.50	132.50
	5	135.00	675.00
	10	140.00	1,400.00
	1	145.00	145.00
	5	150.00	750.00
	2	155.00	310.00
	1	158.00	158.00
	8	160.00	1,280.00
	2	165.00	330.00
	1	166.66	166.66
	3	170.00	510.00
	5	175.00	875.00
	4	180.00	720.00
	2	185.00	370.00
	1	187.50	187.50
	1	197.50	197.50
	10	200.00	2,000.00
	10	210.00	2,100.00
	1	220.00	220.00
	119		16,634.31

Style No.	Quantity.	Selling price.	Total.
385	1	83.69	83.69
	1	90.00	90.00
	2	95.00	190.00
	5	100.00	500.00
	3	105.00	315.00
	2	110.00	220.00
	1	120.00	120.00
	5	130.00	650.00
	4	140.00	560.00
	1	150.00	150.00
	25		2,878.69

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387	2	53.00	53.00
	1	81.25	81.25
	4	83.00	332.00
	2	84.50	169.00
	1	85.00	85.00
	2	93.33	186.66
	2	100.00	200.00
1642	3	105.00	315.00
	1	107.50	107.50
	1	110.00	110.00
	2	120.00	240.00
	1	123.33	123.33
	3	125.00	375.00
	5	130.00	650.00
	2	141.66	283.33
	1	144.83	144.83
	3	150.00	450.00
	2	155.00	310.00
	1	157.00	157.00
	9	165.00	1,485.00
	48		5,452.90

581	1	60.00	60.00
	2	70.00	140.00
	1	73.69	73.69
	2	75.00	150.00
	5	79.17	395.85
	3	80.00	240.00
	1	80.50	80.50
	2	82.50	165.00
	1	83.00	83.00
	5	85.00	425.00

Style No.		Quantity.	Selling price.	Total.
581		11	90.00	990.00
		2	94.00	188.00
		11	95.00	1,045.00
		90	100.00	9,000.00
		2	102.00	204.00
		1	103.00	103.00
		1	103.50	103.50
		13	105.00	1,365.00
		2	107.50	215.00
		27	110.00	2,970.00
		3	112.50	337.50
		49	115.00	5,635.00
		4	120.00	480.00
		1	121.25	121.25
		82	125.00	10,250.00
		1	126.00	126.00
1643	(16)			
581		4	130.00	520.00
		9	135.00	1,215.00
		68	140.00	9,520.00
		6	150.00	900.00
		1	160.00	160.00
		1	170.00	170.00
		1	195.00	195.00
		413		47,626.29
583		4	87.50	350.00
		1	90.00	90.00
		2	92.11	184.22
		24	100.00	2,400.00
		4	105.00	420.00
		3	110.00	330.00
		8	113.89	911.12
		10	115.00	1,150.00
		6	120.00	720.00
		20	125.00	2,500.00
		8	130.00	1,040.00
		1	131.75	131.75
		1	133.15	133.15
		11	135.00	1,485.00
		1	137.50	137.50
		11	140.00	1,540.00
		4	145.00	580.00
		1	147.50	147.50
		7	150.00	1,050.00

Style No.	Quantity.	Selling price.	Total.
583	12	165.00	1,980.00
	1	170.00	170.00
	2	175.00	350.00
	1	195.00	195.00
	143		$17,995.24
585	1	54.17	54.17
	3	75.00	225.00
	1	80.00	80.00
	2	85.00	170.00
	1	90.00	90.00
	10	100.00	1,000.00
	5	115.00	575.00
1644	23		$2,194.17
587	1	88.89	88.89
	1	100.00	100.00
	1	115.00	115.00
	1	125.00	125.00
	1	135.00	135.00
	5		$563.89

(17)

Scales on Hand.

Style No.	1912.
81	23
345	66
346	2
347	12
381	356
382	65
383	684
384	95
385	43
386	1
387	46
395	3
397	2
581	296
583	105
585	34
587	3
595	3

Profits—none.

(18)

Recapitulation.

1911.

Style No.	Quantity.	Amount.
81	5	$515.00
82	1	135.00
181	1	90.00
182	2	180.00
183	4	363.14
186	1	120.00
345	126	12,855.86
346	19	2,255.50
1645		
347	47	5,751.68
349	1	140.00
381	516	65,652.61
382	96	13,183.75
383	737	98,780.04
384	152	22,668.22
385	41	4,376.01
387	15	2,073.66
581	339	36,960.93
583	47	5,434.50
585	26	2,610.00
587	1	125.00
	2,177	$274,270.90

(19)

Recapitulation.

1912.

81	32	$2,709.09
82	17	1,312.50
83	1	80.00
181	2	195.00
345	154	18,027.00
346	1	125.00
347	20	2,540.00
381	518	69,049.61
382	45	6,848.50
383	868	126,071.87
384	119	16,634.31
385	25	2,878.69
387	48	5,452.90

	Quantity.	Amount.
	413	47,626.29
	143	17,995.24
	23	2,194.17
	5	563.89
	2,434	$320,303.97

(20)

1911.

	Quantity.	Labor.	Material.
	5	$32.04	$42.26
	1	6.41	8.45
	1	6.41	8.45
	2	12.82	16.90
	4	25.63	33.81
	1	6.41	8.45
	126	794.64	1,065.00
	19	121.76	160.60
	47	301.19	397.26
	1	6.41	8.45
	516	3,240.92	4,750.76
	96	608.39	892.20
	737	5,113.90	7,945.45
	152	1,063.29	1,651.88
	41	255.07	363.87
	15	103.60	157.09
	339	1,952.57	2,687.73
	47	304.50	451.98
	26	149.83	193.67
	1	6.49	9.15
		$14,112.28	$20,853.41

(21)

Factory Overhead Expenses.

1911 Period.

ndirect Labor	$23,836.86
actory Supplies	9,883.77
xperimental	9,597.12
ools and Patterns	10,228.38
acking and Shipping	10,977.57
umber	1,317.97
rucking	1,046.69
laintenance, Repairs, Alterations	11,195.26

Power, Heat and Light	4,101.46
Superintendent and Factory Offices	8,547.50
Miscellaneous Factory Expenses	3,121.38
Refinishing Expense	17,973.20
Total	$111,827.16

(22)

1647 *Commercial and Selling Expenses.*

1911 Period.

District Managers' Salaries and Expenses	$45,180.62
Branch Offices	97,813.80
Miscellaneous Selling	53,031.42
Cash and Quantity Discounts	16,836.98
Collection and Exchange	5,933.83
Fidelity Bonds	463.35
Freight on Scales	12,679.25
Insurance	2,015.05
Interest	23,595.04
Dining Room	898.21
Legal Expense	7,616.71
Litigation	1,598.81
Office Payroll	64,640.51
Office Supplies	7,382.19
Patent Expenses	14,890.57
Postage	6,924.21
Recording Orders	1,738.09
Rents	1,500.00
Taxes	3,464.24
Telephone and Telegraph	2,736.14
General Expense	2,916.44
Total	$373,855.73

(23)

1911.

Labor	$14,112.28
Material	20,853.41
Total	34,965.69
Factory Overhead—84%	29,371.18
Total Factory Cost	$64,336.87

(24)

1648 1911.

Commissions	$81,617.17
Commercial and Selling Overhead	108,611.28
Losses on Customers' Accounts	3,620.38
Losses on Agents' Accounts	11,354.80
Depreciation on Buildings	303.13
Interest on Capital Invested	13,250.46
Total	$218,757.22

(25)

Recapitulation—1911 *Period.*

Net Sales		$274,270.90
Factory Costs	$64,336.87	
Commissions	81,617.17	
Commercial and Selling	108,611.28	
Losses on Customers' Accounts	3,620.38	
Losses on Agents' Accounts	11,354.80	
Depreciation on Buildings	303.13	
Interest on Capital Invested	13,250.46	
		283,094.09
Loss		$8,823.19

(26)

1912.

Style No.	Quantity.	Labor.	Material.
81	32	$205.07	$270.48
82	17	108.94	143.69
83	1	6.41	8.45
181	2	12.82	16.90
345	154	986.89	1,301.67
346	1	6.41	8.45
347	20	128.17	169.05
381	518	3,253.48	4,769.17
382	45	285.18	418.22
383	868	6,022.88	9,357.73
384	119	832.44	1,293.25
385	25	155.53	221.87
48 331.53	502.69287		
1649 583	143	926.45	1,375.17
585	23	132.54	171.32
587	5	32.45	45.75
	$15,805.99		$23,348.29

(27)

Factory Overhead Expenses.

1912 Period.

Indirect Labor	$19,813.
Factory supplies	10,089.
Experimental	11,714.
Tools and Patterns	8,958.
Packing and Shipping	8,638.
Trucking	1,449.
Maintenance, Repairs, Alterations	7,006.
Power, Heat and Light	4,685.
Superintendent and Factory Offices	8,550.
Miscellaneous Manufacturing Expense	2,128.
Chart Stone Expenses	1,104.
Service Expense	2,677.
Refinish Expense	10,045.
Total	$96,861.

(28)

Commercial and Selling Expenses.

1912 Period.

District Managers' Salaries and Expenses	$30,389.8
Branch Offices	66,654.2
Miscellaneous Selling	39,420.2
Cash and Quality Discount	11,126.3
Collection and Exchange	3,476.4
Fidelity Bonds	112.7
Freights on Scales	11,166.2
Insurance	1,156.0
Interest	18,947.8
Dining Room	1,212.6
Legal Expense	7,840.3
Litigation	4,435.0
Office Payroll	54,520.1
Office Supplies	5,809.1
Patent Expenses	18,090.6
1650 Postage	5,938.2
Recording Orders	1,269.4
Rents	1,800.0
Taxes	3,847.7
Telephone and Telegraph	3,109.3
General Expense	3,198.9
Total	$293,521.5

(29)

1912.

Labor	$15,805.99
Material	23,348.29
Total	39,154.28
Factory Overhead—72.7%	28,465.16
Total Factory Cost	$67,619.44

(30)

1912.

Commissions	$96,589.80
Commercial and Selling Overhead	118,832.77
Losses on Customers' Accounts	3,203.04
Losses on Agents' Accounts	16,047.23
Depreciation on Buildings	348.34
Interest on Capital Invested	19,434.32
Total	$254,455.50

(31)

Recapitulation—1912 *Period.*

Net Sales		$320,303.97
Factory Costs	$67,619.44	
Commissions	96,589.80	
Commercial and Selling	118,832.77	
Losses on Customers' Accounts	3,203.04	
Losses on Agents' Accounts	16,047.23	
Depreciation on Buildings	348.34	
Interest on Capital Invested	19,434.32	
		322,074.94
Loss		$1,770.97

(32)

1651 *Summary* 1911-1912 *Periods.*

Sales—1911	$274,270.90	
" —1912	320,303.97	
Total		$594,574.87
Costs and Expenses—1911	$283,094.09	
" " " —1912	322,074.94	
Total		605,169.03
Loss		$10,594.16
Loss on proportion of sales not represented by alleged infringing device		10,112.30
Loss on proportion of sales represented by alleged infringing device		$481.86

(33)

No. 381.	Chart Assembled.	Per 100.
1—No. 888.	Cylinder Shaft Assembled	$18.77
1— " 525.	Middle Chart Spider	4.56
2— " 620.	End " "	9.57
2— " 1475.	Chart Spider Hub	3.13
2— " 1477.	" " Reinforcement	.59
6— " 1478.	" " Rivets	.09
3— " 619.	" Shaft Dowel Pin	.09
1—	Chart	12.38
16— " 621.	" Staples	.08
	Lacquer	3.33
	Assembling Labor	20.65
	Flat Cost per 100	$73.24
	Flat Cost per Chart	.73

(34)

1652

	No. 385.	Chart Assembled.	Per 100.
1—	No. 888.	Cylinder Shaft Assembled	$18.77
1—	" 1268.	Middle Chart Spider	2.95
2—	" 1263.	End Chart Spider	6.29
2—	" 1475.	Chart Spider Hub	3.13
2—	" 1477.	" " Reinforcement	.59
6—	" 1478.	" " Rivets	.09
3—	" 619.	" Shaft Dowel Pin	.09
1—		Chart	12.38
16—	" 621.	" Staples	.08
		Lacquer	3.33
		Assembling Labor	20.65
		Flat Cost per 100	$68.35
		Flat Cost per Chart	.68

(35)

Affidavit of William A. Zolg.

United States District Court, Northern District of Illinois, Eastern Division.

In Equity.

No. 30024.

THE COMPUTING SCALE COMPANY

vs.

TOLEDO COMPUTING SCALE COMPANY.

Before Charles B. Morrison, Esq., on Accounting.

STATE OF ILLINOIS,
County of Cook, ss:

I, William A. Zolg, being duly sworn on oath, depose and say, that I am the auditor of the Toledo Scale Company, successor to the Toledo Computing Scale Company, defendant in the above entitled cause.

That an examination and audit of the books and records of the defendant company has been made under my personal direction and supervision and also by me personally and that the annexed statement or report has been prepared pursuant to the order of the Master in the accounting in this cause. I hereby certify that said state-

ment or report is based on the figures and transactions as
1653 they appear on said books and records and is true and correct according to my best information and belief.

WILLIAM A. ZOLG.

Subscribed and sworn to before me this 14th day of January, 1915.
[SEAL.] VICTOR B. SCOTT,
Notary Public.

And on to-wit: the 18th day of May, 1918 came the plaintiff herein by its attorneys and filed in the Clerk's office of said Court its certain Exceptions to Master's Report, in words and figures following, to-wit:

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. 30024.

THE COMPUTING SCALE COMPANY

v.

TOLEDO COMPUTING SCALE COMPANY.

Plaintiff's Exceptions to Master's Report.

Filed May 18, 1918.

Now comes the plaintiff, The Computing Scale Company, and excepts to the report of Charles B. Morrison, Esq., Master in Chancery, filed in this cause April 30, 1918, and for cause of exception shows:

First. That while the Master on page 50 of his report has amended his report on page 6 thereof so as to state with respect to an excess allowance made by an agent for an exchange scale that "such excess allowance the agent had to stand and the amount was charged against his account," nevertheless the Master, on page 19 of his report, has found that such "excess allowance was charged against" the agent's "commissions in the commission account and he was paid the difference between the commission earned on the sale and the amount of the excess allowance"; whereas the Master, on page 19 of his report, should have found that such excess allow-
ance was charged against the agent's account, thus reducing
1654 the amount of commissions credited to the agent's account, but that such excess allowance did not appear in the general commissions account of the defendant at all.

Second. That the Master, on page 19 of his report, has found that in the account filed by the defendant on January 15, 1915, called the "defendant's account," Zolg "reported the net commissions received by agents after "the defendant" had deducted therefrom excess allowances made by such agents to purchasers and did not

report the amount of commission the agent was entitled to on such sales or that" defendant "in fact paid". In this finding the Master erred, because the said defendant's account and the verification thereof by the defendant's auditor Zolg, as well as all testimony on the subject, show that the commissions reported by Zolg in said defendant's account represented the commissions "as shown by the accounts on the books" of the defendant, and the legal presumption is that the defendant took credit in said defendant's account for the largest amount of commissions which the defendant was entitled to deduct on the sales appearing in said defendant's account.

Third. That the Master has found that it is not disputed that the defendant is entitled to a credit for interest on its investment in the business; whereas the Master should have found that the plaintiff disputes that defendant is entitled to interest on investment, since plaintiff claims that no ascertainable investment for the production of cylinder scales is shown by the evidence and has admitted that there should be an apportionment of interest actually paid on the basis of net sales as an expense.

Fourth. That the Master has found that during the accounting period the defendant is entitled to charge against profits on cylinder scales interest on investment, found by taking the valuations of the tangible assets of the defendant, excluding therefrom patents and good will, and apportioning that total interest so found to cylinder scales in the respective years on the basis of gross sales. The plaintiff excepts thereto on the grounds that the method of ascertaining the whole investment is incorrect and the method of ascertaining investment for cylinder scale production is incorrect, and that there is no proof in the record that any part of any alleged investment was caused or rendered necessary by cylinder scale business, and any apportionment should be made on the basis of net sales which alone produce revenue to pay interest, and the Master by reducing the interest charge against scales made by the defendant, other
1655 than cylinder scales, has allowed defendant to obtain a positive benefit from the infringing business by charging against the profits from infringing scales a portion of the interest on its investment existing when the manufacture and sale of infringing scales was begun and thereby has relieved scales, other than infringing, of a part of the interest charge that they would have been compelled to bear if the infringing business had not been begun; moreover, the alleged increase in investment of the defendant is shown by the books of the defendant to have been made out of money borrowed on bills payable, and on allowance for interest actually paid, apportioned according to net sales, would therefore be entirely just. The finding of the Master, to which this exception applies, results in a total interest charge for the years 1906, 1907, 1908, 1909, 1910, 1911 and 1912 (8 months) apportionable to cylinder sales of $114,141.18, as shown in "Table N" on page 26 of the Master's report; whereas the Master should have found that the interest chargeable for said years respectively was interest actually paid as shown by the books

of defendant, apportionable to cylinder sales on the basis of net sales (which alone produce revenue to pay interest), resulting as follows:

	Interest actually paid by defendant.		Percentage of net sales of cylinder scales to total net sales.	Apportionable to cylinder sales.
1906	$4,835.42	of which	1.14% =	$55.12
1907	5,716.83	" "	26.00% =	1,486.38
1908	9,671.85	" "	51.66% =	4,996.48
1909	17,150.26	" "	48.80% =	8,369.33
1910	24,129.42	" "	59.46% =	14,347.35
1911	28,432.90	" "	60.40% =	17,173.47
1922 (8 mo.)	18,947.80	" "	58.76% =	11,133.73
Total				$57,561.86

The difference between the total interest charge, apportionable to cylinder sales, found by the Master and the charge, apportionable to cylinder sales, that should be allowed for interest actually paid, is the difference between $114,141.18 and $57,561.86, which difference is $56,579.32, which should be added to the profits in cylinder scales shown in the Master's report.

Fifth. That the Master has found that the plaintiff is not entitled to any of the Canadian profit for the years 1908, 1909, 1910, 1911 and 1912 (8 mo.); whereas the Master should have found.

1656 (*a*) That all of the Canadian sales were made from Toledo and in point of law were sales made in the United States where the orders were accepted, the invoicing and billing made and all accounts of selling such scales entered and carried, and collections therefor made;

(*b*) That by reason of the fact that necessary parts of the infringing scales were made at Toledo and shipped from Toledo to the assembling factory in Canada for use in assembling infringing scales there, in point of law such fact renders all such scales put together in Canada accountable for as if all made in the United States;

(*c*) That the accounts as to such Canadian sales were inextricably mingled on the books of the defendant with the accounts as to United States sales;

(*d*) That the whole of the Canadian profit on cylinder scales, shown by the books of the defendant to be $56,141.24, should be accounted for by the defendant as profits on infringing scales, from which should be deducted, of course, the amount of commercial and selling overhead expenses applicable to Canadian business in the sum of $40,492.48, found by the Master on pages 29 to 34, inclusive, of his report and summarized in "Table Q" on page 34 of said report, and by the Master allowed and added in his statement of the account of profits on cylinder scales, for the reason that said sum of $40,-

492.48 had been deducted from cylinder business other than Canadian business, whereas it should have been deducted from Canadian business. This leaves a net amount of $15,548.73 of Canadian profit to be added to the Master's statement of account of profits.

Sixth. That the Master has not found that second-hand scales taken in exchange for infringing scales sold were taken and accepted by defendant at the various values shown to make up the total of the allowance accounts, and that the defendant as a trustee is bound to account to plaintiff for the values at which it took and accepted such second-hand scales, either in money or in such scales at the option of the plaintiff, and that no part of the allowance accounts can be charged against cylinder scale profits over the objection of the plaintiff.

Seventh. That the Master has not found that the defendant is accountable for the values in cash of second-hand scales as shown by the totals of the allowance accounts as the amounts in cash at which the defendant acquired the exchange scales in exchange for
1657 property as to which the defendant was a trustee for the plaintiff, the result of which would be an addition to profits for the infringing period of the sums of $211.52 for 1906, $6,431.75 for 1907, $42,828.86 for 1908, $40,396.26 for 1909, $60,268.58 for 1910, $90,717.74 for 1911 and $53,811.56 for 1912 (8 mo.), making a total of $294,666.27, from which should be deducted the sum of $197,493.93 on aciount of seiond-hand sales for the infringing period, making a net addition to profits of $97,172.34, to be added to the profits found in the Master's report.

Eighth. That the Master has found that plaintiff is not entitled to profit upon 1839 cylinder scales on hand at the close of the accounting period; whereas the Master should have found that the plaintiff is entitled to have the defendant account for said 1839 scales at a profit of approximately $20 per scale which amount of profit on scales on hand was $36,780 and should be added to the profits found by the Master on cylinder scales.

Ninth. That the Master has found that the plaintiff is not entitled to any profit upon scales on hand at the end of the accounting period unless it is shown that the said scales on hand were afterwards sold and the profit actually realized by sales and that profits under the law are ascertainable only by a sale; whereas the Master should have found,

(*a*) That profit on an infringing article can be ascertained by the value of the infringing article at the time of the accounting over and above its cost of production and that profits made in an established business shown by the evidence over the preceding years is a lawful measure of such profits;

(*b*) That gains and advantages of the defendant are profits under the law, while losses to the plaintiff are damages under the law and

all gains and advantages to the infringer resulting from infringement, whether by means of sales or in other ways, must be accounted for, and that the defendant must account under the head of profits for every gain and advantage obtained by its infringement; that one of such gains and advantages in this case was that at the end of the accounting period the defendant had on hand 1839 infringing scales which the evidence shows at that time to be worth $20 per scale over and above the cost of manufacture and sale; and that at that moment (the end of the accounting period) the defendant was the trustee of the plaintiff for said value of said scales over and above the cost of manufacture and sale, and the defendant by retaining said scales appropriated said value which thereby became a gain and advantage to the defendant for which it must account and which value is
1658 ascertainable from the evidence and is in no sense speculative.

Tenth. That the Master has found that potential or prospective profits cannot be recovered; whereas the Master should have found that the evidence in the record shows a legal basis for estimating the profits on scales on hand and that the same rule applies as to profits in patent infringement accountings as in other cases where profits to be recovered are in question infringed articles on hand made by means of infringement during the accounting period.

Eleventh. That the Master has found that this suit has proceeded on the theory of recovering profits; whereas the Master should have found,

(*a*) That the record shows no waiver of damages and that the reference was to ascertain both profits and damages, and the evidence when offered, was not in any way limited to profits alone;

(*b*) That as to the scales on hand at the end of the accounting period, the defendant was trustee for the plaintiff as to all valuation in said scales then ascertainable under the evidence over and above the cost of manufacture and sale and that by the rules of law the plaintiff would be entitled to the selling price of such scales over and above the cost of manufacture and sale as damages against the converter of its property;

(*c*) That the plaintiff asks only for the selling price over and above the cost of manufacture and sale which includes commissions and interest on investment and losses, which claim is far more favorable to defendant than the rule as to damages which is imposed by the law and if said amount of value in scales is to be considered not as a gain or advantage to defendant but a loss or damage to plaintiff, plaintiff is entitled to said sum as damages not covered by the profits alowed, but the expenses of which, both in manufacture and sale, have been fully allowed for.

Twelfth. That the Master has found that the defendant is not required to account for the gain and advantage in good will of a business infringing scales obtained by means of the continuous infringement of the defendant during the accounting period which

gain or advantage remained to the defendant at the end of the accounting period; whereas the Master should have found,

(*a*) That the decree of this court made and entered June 25, 1912, granted a perpetual injunction retraining the defendant
1659 from making, using or vending any of the infringing scales; that upon the petition of the defendant stating that the patent infringed would expire by limitation on September 3, 1912, and that such injunction would irreparably damage the defendant's business as a going concern, the said injunction was suspended pending appeal, by order of this Court made and entered on said June 25, 1912, and that said defendant's business in infringing scales continued without interruption until and after September 3, 1912, when the patent expired by limitation and that the good will of said infringing business remained to the defendant on said last named day as a valuable asset obtained by the defendant by means of the expenditures prior thereto during the accounting period which expenditures had been allowed to the defendant as charges against the profits on infringing scales and that a benefit, gain, and advantage resulted to defendant therefrom from the fact that the benefit of expenditures allowed to defendant during the infringing period continued to the defendant after the accounting period expired by reason of the expiration of the patent;

(*b*) That the patent having expired before a perpetual injunction was enforced, the defendant obtained as a gain from its infringement a going business in scales theretofore infringing which going business had been established through the infringement, the expenses of establishing which had been paid for by its whole business, and the proportionate part of which had been allowed as expenditures against infringing scales and against the profits on the infringing business; that certain of such expenditures allowed, namely, advertising and branch office expenses, were expenditures of which defendant would enjoy the benefit after the accounting period had expired as shown by the evidence; and that, as shown by the evidence, a fair method of allowing for some of the defendant's said gain is to distribute expenditures of permanent benefit, such as advertising and branch office expenses, one-fifth to the year in which the expenditure was made and one-fifth to each of the succeeding four years;

(*c*) That as shown by the evidence, the advertising expenses allowed, beginning with the year 1908 and through the rest of the accounting period, were as follows, from which have been deducted the following amounts allowed for Canadian expense so as to show amounts of advertising expense actually allowed against the whole business in scales sold in the United States:

1660

1908.....	Advertising	$15,048.45,	deduct	1.77%	leaving	$14,782.09
1909.....	"	19,777.36,	"	6.22%	"	18,547.21
1910.....	"	26,986.86,	"	8.15%	"	24,787.43
1911.....	"	35,349.47,	"	11.70%	"	31,213.58
1912 (8 mo.).....	"	23,173.49,	"	12.01%	"	20,390.35

Of these amounts the following percentages have been allowed against cylinder scale sales:

1908.....	$14,782.09	of which	charged	to	cylinders	50.83%.....	$7,513.74
1909.....	18,547.21	"	"	"	"	"	49.58%.....	9,195.71
1910.....	24,787.43	"	"	"	"	"	60.11%.....	14,899.72
1911.....	31,213.58	"	"	"	"	"	60.99%.....	19,037.16
1912 (8 mo.).	20,390.35	"	"	"	"	"	59.36%.....	12,103.71

This advertising expense distributed on the five-year basis would amount to the following sums which should be carried over to the period succeeding the close of the accounting period and therefore should be deducted from the expense allowed, or what is the same thing, should be added to the profits found by the Master.

1908.....	$7,513.74	carry	over	1/15	thereof.....		$500.92
1909.....	9,195.71	"	"	4/15	"	.....	2,452.19
1910.....	14,899.72	"	"	7/15	"	.....	6,953.20
1911.....	19,037.16	"	"	10/15	"	.....	12,691.44
1912 (8 mo.).....	12,103.71	"	"	12/15	"	.....	9,682.72
Total of advertising carried over.....							$32,280.72

Branch office expenses suffered no deduction for Canadian business, and the year, the amount of those expenses, the percentage charged to cylinder sales, the amount thus charged, the fraction thereof to be carried over to the period succeeding the accounting period and the amount thus to be carried over are given in the following table:

1908.....	$43,911.03	50.83%	$22,319.98	1/15	thereof.....		$1,488.00
1909.....	57,902.22	49.58%	28,707.92	4/15	"	.....	7,655.44
1910.....	83,157.90	60.11%	49,986.21	7/15	"	.....	23,326.90
1911.....	115,173.59	60.99%	70,244.37	10/15	"	.....	46,829.58
1912 (8 mo.).	66,654.29	59.36%	39,565.99	12/15	"	.....	31,652.79
Total of branch office expense carried over.....							$110,952.71

The total of advertising and branch office expenses to be thus carried over is $143,233.43, for which the claim of the plaintiff for an allowance of $100000 is reasonable, and said $100000 should be added to cylinder scale profits as an allowance in part for that portion of the advertising and branch office expenses which should equitably be carried over to the period succeeding the accounting period, the gain, value or advantage whereof was enjoyed
1661 by the defendant after the close of the accounting period, or as an equivalent for part of the good will acquired by the infringement.

Thirteenth. That the Master has not added to the total profits shown by his accounting the following amounts, making the profits the following total:

Total profits shown by the Master	$404,101.97
Additional profits taken by excessive interest allowances	56,579.32
Additional profits on Canadian sales	15,648.76
Additional profits taken on exchange allowances	97,172.34
Additional profits or damages, scales on hand	36,780.00
Additional gain obtained by expense producing Good Will	100,000.00
Total Profits	$710,282.39

Fourteenth. That, while the Master has substantially found, and so stated on the argument of objections to his draft report, that, irrespective of other questions, there can be no division of profits in this case for the reason that the profits upon the whole infringing scale are shown by the evidence to be so inextricably mingled that it is impossible to find or ascertain any particular part of the profit to be attributable to any part of the infringing scale, the Master has not made this finding in the specific form and manner aforesaid as requested by the plaintiff.

ZANE, MORSE & McKINNEY,
Solicitors for Plaintiff.

(Endorsed:) Filed May 18, 1918, T. C. MacMillan, Clerk.

And on to-wit: the 18th day of May, 1918, came the defendant herein by its attorneys and filed in the Clerk's office of said Court its certain exceptions to Master's Report, in words and figures following, to-wit:

1662 In the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. 30024.

THE COMPUTING SCALE COMPANY
vs.
TOLEDO COMPUTING SCALE COMPANY.

Exceptions of Defendant to the Report of Honorable C. B. Morrison, Master in Chancery Herein.

Filed May 18, 1918.

The defendant excepts to the report of the Master in the following particulars:

1. That said report includes profits found by the Master which have been earned by the defendant before March 8, 1911, at which time the defendant first began the manufacture and sale of scales equipped with drums containing spiders made of aluminum or other light material.

2. For that said Master, in and by said report, has failed to make any finding of the total profits realized by the defendant in its business during the accounting period, and has failed thereafter to make a division of these profits as between fan and cylinder scales on the basis of sales.

3. For that said report is based upon a ruling of said Master with reference to the defendant's offer to prove by the depositions of Thomas Z. Phinney, John H. Devlin, Charles H. Tierney, E. Willard Horton, Joseph McNally, Daniel C. Fallon, William H. Gillan, Orwell C. Reeves, William L. Flaherty and Edward J. Lindow, and the exhibits returned therewith, which were offered in evidence by the defendant, but which were not admitted in evidence by the Master, the existence and character of the scale known as the "Phinney Scale" equipped with drums containing wooden spiders as a scale which was open to the public to use at and before the time of the invention of the patent in suit herein and as a scale constituting a comparison whereby the true profits due to the patented invention might be ascertained with reasonable accuracy, and that in view thereof the plaintiff is entitled merely to the difference between the costs of drums equipped with metal spiders such as are covered by plaintiff's patent and the costs of drums equipped with wooden spiders such as used in the Phinney scales, which difference is shown by the depositions and exhibits in question to be the sum of thirty-one and eighty-eight one hundredths cents per scale.

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4. For that such report is based upon a ruling by which said Master refused to inspect and consider in evidence the exhibit offered by said defendant and known as "Toledo Exhibit Number 1" which was returned with the depositions of Orwell C. Reeves, William L. Flaherty and Edward J. Lindow, such scale being a cylinder scale equipped with a drum containing wooden spiders such as were open to the use of the public, including the defendant, during the accounting period.

5. For that said Master, in and by such report, allows to said plaintiff profits upon a device known as an electric lighting attachment which was attached to certain of defendant's scales, the number of which were shown by the record, and the additional profits accruing to said defendant by the manufacture and sale of such additional equipment being specifically shown in the record.

6. For that said Master in such report allows to said plaintiff profits accruing to said defendant by reason of the peculiar and special finish upon certain of the cylinder scales manufactured and sold by it, which finish was known as the "Gold Finish," the amount of which additional and special profit upon such scales was specifically shown in the record.

7. For that said Master in such report has failed to allow to the defendant as a credit litigation expense shown on the books of said defendant and necessary and usual in the course of its business.

8. For that said Master in such report has failed to allow to the defendant as a credit Patent Expense shown on the books of said defendant and necessary and usual in the course of its business.

9. For that said Master in said report has failed to allow to the defendant as a credit expenses shown in the Experimental Account on the books of said defendant and necessary and usual in the course of its business.

10. For that said Master has nowhere in such report allowed to the defendant as a credit losses by it sustained by reason of the depreciation in value of its patents.

11. For that said Master has found that the information upon which the witness, William A. Zolg, based his cost figures for the period from March 8, 1911, to August 31, 1912, for the costs
1664 of direct labor and material, was obtained by him during the many years he was in charge of the Accounting Department, whereas the record shows that such information was obtained by him only after the Master had ordered the account herein, and was obtained from the Factory Superintendent, and was a matter of which said Zolg had no first hand knowledge.

12. For that said Master has found that the connection of the witness Zolg with the Toledo Company renders it practically certain that the cost figures furnished by him are not unfair to that company, whereas the testimony and documentary evidence adduced in the case show that such cost figures are too small in amount and erroneous and were furnished to said witness by others and were submitted by such witness just as he received them and without knowledge on his part as to their inaccuracy.

13. For that said Master has found that the cost of labor and material did not vary materially during the accounting period, and upon such assumption, has fixed the manufacturing costs of cylinder scales in that portion of the accounting period other than that from March 8, 1911, to August 31, 1912, upon the same basis as in the period last mentioned, whereas there is no evidence in the record to support such an assumption.

14. For that said Master has found in Table G in his said report certain amounts under the caption "Factory Overhead" as part of the cost of the manufacture of the infringing scales, which amounts are too low by reason of the fact that the base figures for direct labor and material used by the Master to obtain the proportionate share of total Factory Overhead chargeable to cylinder scales were in themselves too low.

15. For that said report is based upon rulings of said Master wherein he refused to receive in evidence the testimony of the witness O. C. Reeves and the cost sheets of the defendant most closely related to the accounting period in time and the nature of scales concerned in which costs were shown, in order to have a basis of comparison of such estimated costs as between fan and cylinder scales and thus to determine how much difference and shortage there

was between the amount of estimated costs and actual costs as shown on the books so as to divide the amount of such shortage between fan and cylinder scales upon an equitable basis, such estimated cost sheets being the source from which the information as to
1665 direct labor and material costs was furnished to the witness, William A. Zolg, as to cylinder scales.

16. For that said report is based upon assumptions of the Master as to manufacturing costs, which assumptions were not founded upon evidence in the cause, and that said Master has refused to reopen the taking of testimony in such cause for the purpose of taking the testimony of F. S. Johnson and E. Rouse, as requested by the defendant, in order to determine the amount of manufacturing cost of fan scales for the year 1905 and subsequent years, and thus to be able to fix the manufacturing costs of cylinder scales for the accounting period.

17. For that said Master did not find the commissions paid by the defendant and the charge upon its sales of cylinder scales for the year 1911 to be the amount found by the accountants for the defendant and shown in the record by the testimony of such Accountants.

18. For that said Master has found that the books of the defendant were kept without any effort to distinguish between fan and cylinders as to allowances, and that the great number of transactions that had to be analyzed renders it uncertain whether the allocation made by the defendant's Accountants would produce reasonably accurate results, whereas the evidence discloses that the books of the defendant, and particularly the Customers' Ledger Accounts, showed whether any particular allowance was made upon a fan or cylinder scale, and the Accountants of the defendant for the year 1911 by reference to each of such accounts allocated One Hundred and Seventeen Thousand Eight Hundred and Eighty-five Dollars and Six Cents ($117,885.06) of such allowances as directly chargeable to cylinder scales, which evidence the Master has wholly and without warrant disregarded upon the assumption that the Accountants could not analyse and allocate such items within the time at their disposal, although there is no evidence in the record in support of such assumption.

19. For that said Master has found the allowances made from the purchase price of cylinder scales as per Table M of such report, and has failed to find that in the year 1911 the amount of such allowances, as specifically allocated as shown by the testimony of W. E. Seatree and J. A. Bowman and Defendant's Exhibit 21, was the sum of One Hundred and Seventeen Thousand Eight Hundred and Eighty-five Dollars and Six Cents ($117,885.06) instead of Ninety Thousand Seven Hundred and Seventeen Dollars and
1666 Seventy-four Cents ($90,717.74) as found by the Master, and that the allowance for the other years of such accounting period are shown by the testimony of W. E. Seatree.

20. For that said Master has, in and by such report, having failed to allow to said defendant any credit for the items in Patent Expense and Experimental Accounts during the accounting period, also failed to allow to said defendant any interest upon the amounts shown in the record as invested by the defendant in the patent and experimental work at the commencement of and during the accounting period.

21. For that said Master has in such report failed to allow to said defendant any amount for losses by it sustained during the accounting period for depreciation in value of its patents from time to time by reason of the pro rata shortening or lessening of the time for which such patents would continue in force and effect.

22. For that said Master has in such report charged to the defendant and allowed to the plaintiff certain items of expense in the Canadian business by comparing the total amount of sales in the United States and Canada with the amount of such sales in Canada, which method of comparison and division is unfair to the defendant by reason of the difference in the conditions surrounding such sales.

23. For that, in and by said report, said Master has failed to find what elements were embodied in the cylinder scales in question other than the infringing drums or cylinders.

24. For that, in and by said report, said Master has failed to find that certain patent devices covered by Letters Patent owned by the defendant and shown by the evidence in the cause were embodied in the cylinder scales manufactured and sold by the defendant.

25. For that, in and by said report, said Master has found that the elements in the cylinder scales in question other than the infringing drums were old and open to the public, and none of them, if separated from the structure of which it is a part, would in itself be a useable or workable tool, which finding is not supported by the evidence in the cause.

26. For that, in and by said report, the said Master has found that the uncontradicted testimony of Dr. Reichmann, and others of defendant's witnesses as to the relative value of the different parts of the complete machine known as the cylinder scale in question was not helpful in an effort to determine whether all or only a portion of the profits on the sales of such scales was due to the patent in question

27. For that said Master has found that the evidence in the case was not sufficient to establish that any portion of the profits is due to causes other than the patent in suit.

1667 28. For that said report is based upon a ruling by said Master in which said Master refused to allow the witness, John L. Theobald, called on behalf of the defendant, to testify as to what were the talking points upon which the defendant sold the cyl-

inder scales in question, and because said Master refused to allow said witness to answer such questions.

29. For that the said Master, in and by said report, has awarded all the profits on the scales containing the infringing devices to the complainant, whereas the invention in issue relates to a segregable part thereof, and whereas plaintiff has adduced no evidence that the salability of the entire scale is due to said invention.

30. For that, in and by said report, said Master has found that there was no evidence that the salability of said cylinder scales was due to causes other than the indicator drum in issue, whereas he should have shown that the sales of the infringing scales were due to the employment of parts or features other than such indicator drum, such as pendulum system, the platform construction of scale, the honest chart, the front and rear indication, the dash-pot, the leveling device, the electric light attachment, the Gold Finish, the slogan of "No Springs—Honest Weight."

31. For that in said report said Master has failed to find that those parts of the defendant's infringing scale, in addition to the indicator drum in suit, had value independent of their association with the indicator drum; inasmuch as other forms of indicating mechanism which did not embody the invention in issue could be substituted for the indicator drum in said infringing scales.

32. For that said Master has refused to receive in evidence testimony and documentary evidence offered by the defendant and shown in the record in this cause, and has received in evidence testimony and documentary evidence offered by the plaintiff against the objections of the defendant.

33. For that said Master has found that the plaintiff is entitled to a decree against the defendant for the sum of Four Hundred and Four Thousand One Hundred and One Dollars and Ninety-seven Cents ($404,101.97).

TOLEDO COMPUTING SCALE COMPANY,
By RECTOR, HIBBEN, DAVIS & MACAULEY, AND
ALBERT H. MEADS,
Its Solicitors.

(Endorsed:) Filed May 18-1918. T. C. MacMillan, Clerk.

1668 And afterwards to-wit: on the 20th day of May, 1918, again came the defendants herein by its attorneys and filed in the Clerk's office of said Court its certain Additional Exceptions to Master's Report, in words and figures following, to wit:

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. 30024.

THE COMPUTING SCALE COMPANY

vs.

TOLEDO COMPUTING SCALE COMPANY.

Additional Exceptions of Defendant to the Report of Honorable C. B. Morrison, Master in Chancery.

Filed May 20, 1918.

The defendant excepts to the report of the Master in the following particulars:

1. For that said Master, having found that all of the cylinder scales manufactured and sold by the defendant had front and back indications substantially as in Complainant's Exhibit of Defendant's scale, did not find that such feature constituted a valuable constituent part of such scales, and for that he did not find that such constituent part contributed to the profits realized from the sales of such scales.

2. For that said Master has erroneously interpreted the decision of the Court of Appeals in the this case relating to the character and scope of the patent and its far reaching effect in the computing scale art.

TOLEDO COMPUTING SCALE COMPANY,
By RECTOR, HIBBEN, DAVIS & MACAULEY, AND
ALBERT H. MEADS,
Its Solicitors.

(Endorsed:) Filed May 20-1918. T. C. MacMillan, Clerk.

And afterwards, to-wit: on the 5th day of March, 1919, being one of the days of the regular March term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Kenesaw M. Landis, District Judge, appears the following entry, to-wit:

1669 *Decree of Mar. 5, 1919.*

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

Mar. 5, 1919.

Present: Honorable Kenesaw M. Landis, District Judge.

In Equity.

No. 30024.

THE COMPUTING SCALE COMPANY

vs.

TOLEDO COMPUTING SCALE COMPANY.

Final Decree.

This cause came on to be further heard at this term, and was argued by counsel; and thereupon on consideration thereof.
It is Ordered, Adjusted and Decreed as follows:

1. That the interlocutory decree heretofore entered in this cause on the sixth day of May, 1914, be and the same is hereby made the final decree in this cause with respect to the matters decreed in said interlocutory decree.

2. That the exceptions of the plaintiff, The Computing Scale Company, to the report of Charles B. Morrison, Esq., Master in Chancery of this Court, to whom by the aforesaid decree of this Court made and entered on the sixth day of May, 1914, this cause was referred with directions to take and state an account of the profits, gains and advantages derived, received or made by the defendant and assess the damages sustained by the plaintiff, by reason of the infringement by the defendant of Reissued Letters Patent No. 11,536, and report thereon to the Court, which said report, made by said Master, was, by said Master, heretofore filed in this Court on the sixth day of May, 1918, be and said exceptions of the plaintiff are, and each of them is, hereby overruled and denied.

3. That the exceptions of the defendant, Toledo Computing Scale Company, now Toledo Scale Company, to the said report be and said exceptions of the defendant are, and each of them is, hereby overruled and denied.

4. That the said report and the findings and conclusions
1670 of fact and of law therein contained be and hereby are in all things approved and confirmed.

5. That the defendant has, heretofore, during the pendency of this cause, changed its corporate name from Toledo Computing Scale Company to Toledo Scale Company.

6. That the plaintiff, The Computing Scale Company, is entitled to have and recover of and from the defendant, Toledo Computing Scale Company, now Toledo Scale Company, the gains and profits made by the defendant and the damages sustained by the plaintiff, by reason of the said infringement by the defendant of said Reissued Letters Patent No. 11,536, as the same are ascertained and found in and by the said report, in the sum of four hundred and four thousand one hundred and one and 97/100 dollars ($404,101.97) with interest thereon from the said sixth day of May, 1918, the said date of the filing in this Court of the said report, up to the date of this decree, at the rate of five (5) per centum per annum, together with plaintiff's costs and disbursements herein incurred to be taxed.

7. That the plaintiff, The Computing Scale Company, do have and recover of and from the defendant, Toledo Computing Scale Company, now Toledo Scale Company, the sum of four hundred and twenty thousand eight hundred and eighty three and 44/100 dollars ($420,883.44) together with interest thereon from the date of this decree until paid and that the plaintiff have execution therefor;

And that the plaintiff do have and recover of and from the defendant the costs and disbursements of the plaintiff incurred in this cause since the sixth day of May, 1914, the date of entry of the decree for an accounting and reference, to be taxed, and that plaintiff have execution therefor.

By the Court: KENESAW M. LANDIS, *Judge.*

And on to-wit the 5th day of March, 1919, came the defendant, herein, by its attorneys, and filed in the Clerk's office of said Court its certain Petition for Appeal, in words and figures following, to-wit:

1671 In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In Equity.

No. 30024.

THE COMPUTING SCALE COMPANY, Plaintiff,

vs.

TOLEDO COMPUTING SCALE COMPANY, Defendant.

Petition for Appeal and Supersedeas.

Filed Mar. 5, 1919.

The above named defendant, Toledo Computing Scale Company, now the Toledo Scale Company, conceiving itself aggrieved by the

decree made and entered in the above entitled cause on the 5th day of March, 1919, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Seventh Circuit, for the reasons specified in the assignment of errors which is filed herewith, and prays that its appeal may be allowed and a citation issued directed to the above named complainant, commanding it to appear before the United States Circuit Court of Appeals for the Seventh Circuit, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and papers in said cause, upon which said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Seventh Circuit.

And the said defendant further prays that its said appeal may be allowed to operate as a supersedeas, and that execution of said decree be stayed pending a hearing and determination of said appeal.

ALBERT H. MEADS,
RECTOR, HIBBEN, DAVIS & MACAULEY,
Solicitors for Defendant.

Order Allowing Appeal.

Ordered that the foregoing appeal be allowed, and that defendant file a bond in the sum of Five Hundred Dollars ($500.00), to be approved by the Court, to secure the complainant's costs upon said appeal.

Further Ordered that said appeal operate as a supersedeas upon the filing by the defendant of a due and sufficient bond, in the penal sum of Four Hundred and Fifty Thousand Dollars, to be
1672 approved by the Court, conditioned to secure to the complainant the payment of said decree, with interest and costs, in event the defendant shall fail to prosecute and make good its said appeal.

KENESAW M. LANDIS,
United States District Judge.

(Endorsed:) Filed March 5, 1919. T. C. MacMillan, Clerk.

And on to-wit: the 5th day of March, 1919, came the defendant herein, by its attorneys, and filed in the Clerk's office of said Court its certain Assignment of Errors, in words and figures following to-wit:

Defendant's Assignment of Errors.

Filed Mar. 5, 1919.

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In Equity.

No. 30024.

THE COMPUTING SCALE COMPANY, Plaintiff,

vs.

TOLEDO COMPUTING SCALE COMPANY, Defendant.

Assignment of Errors.

And now comes the above named defendant, Toledo Computing Scale Company, now the Toledo Scale Company, by its solicitors, and presents with the accompanying petition for appeal from the decree entered in this cause on the 5th day of March, 1919, the following assignment of errors:

1. That the Court erred in ordering and decreeing that the interlocutory decree entered in said cause on or about the 6th day of May, 1914, be made the final decree in said cause with respect to the matters decreed in said interlocutory decree, and in not ordering the bill of complaint in said cause to be dismissed for lack of proof of ownership of and title to the letters patent in suit by the complainant.

2. That the Court erred in overruling, and in not sustaining, the first of defendant's exceptions to the report of the Master filed
1673 in said cause on or about the 6th day of May, 1918, which exception is in the words and figures following:

"1. That said report includes profits found by the Master which have been earned by the defendant before March 8, 1911, at which time the defendant first began the manufacture and sale of scales equipped with drums containing spiders made of aluminum or other light material."

3. That the Court erred in overruling, and in not sustaining, defendant's second exception to the said Master's report, which exception is in the words and figures following:

"2. For that said Master, in and by said report, has failed to make any finding of the total profits realized by the defendant in its business during the accounting period, and has failed thereafter to make a division of these profits as between fan and cylinder scales on the basis of sales."

4. That the Court erred in overruling, and in not sustaining, defendant's third exception to the said Master's report, which exception is in the words and figures following:

"3. For that said report is based upon a ruling of said Master with reference to the defendant's offer to prove by the depositions of Thomas Z. Phinney, John H. Devlin, Charles H. Tierney, E. Willard Horton, Joseph McNally, Daniel C. Fallon, William H. Gillan, Orwell C. Reeves, William L. Flaherty, and Edward J. Lindow, and the exhibits returned therewith, which were offered in evidence by the defendant, but which were not admitted in evidence by the Master, the existence and character of the scale known as the "Phinney Scale," equipped with drums containing wooden spiders as a scale which was open to the public to use at and before the time of the invention of the patent in suit herein and as a scale constituting a comparison whereby the true profits due to the patented invention might be ascertained with reasonable accuracy, and that in view thereof the plaintiff is entitled merely to the difference between the costs of drums equipped with metal spiders such as are covered by plaintiff's patent and the costs of drums equipped with wooden spiders such as used in the Phinney scales, which difference is shown by the depositions and exhibits in question to be the sum of thirty-one and eighty-eight one hundredths cents per scale."

5. That the Court erred in overruling, and in not sustaining, defendant's fourth exception to the said Master's report, which exception is in the words and figures following:

1674 "4. For that such report is based upon a ruling by which said Master refused to inspect and consider in evidence the exhibit offered by said defendant and known as "Toledo Exhibit Number 1" which was returned with the depositions of Orwell C. Reeves, William L. Flaherty and Edward J. Lindow, such scale being a cylinder scale equipped with a drum containing wooden spiders such as were open to the use of the public, including the defendant, during the accounting period."

6. That the Court erred in overruling, and in not sustaining, defendant's fifth exception to the said Master's report, which exception is in the words and figures following:

"5. For that said Master, in and by such report, allows to said plaintiff profits upon a device known as an electric lighting attachment which was attached to certain of defendant's scales, the number of which were shown by the record, and the additional profits accruing to said defendant by the manufacture and sale of such additional equipment being specifically shown in the record."

7. That the Court erred in overruling, and in not sustaining, defendant's sixth exception to the said Master's report, which exception is in the words and figures following:

"6. For that said Master in such report allows to said plaintiff profits accruing to said defendant by reason of the peculiar and spe

cial finish upon certain of the cylinder scales manufactured and sold by it, which finish was known as the "Gold Finish," the amount of which additional and special profit upon such scales was specifically shown in the record."

8. That the Court erred in overruling, and in not sustaining, defendant's seventh exception to the said Master's report, which exception is in the words and figures following:

"7. For that said Master in such report has failed to allow to the defendant as a credit litigation expense shown on the books of said defendant and necessary and usual in the course of its business."

9. That the Court erred in overruling, and in not sustaining, defendant's eighth exception to the said Master's report, which exception is in the words and figures following:

"8. For that said Master in such report has failed to allow to the defendant as a credit Patent Expense shown on the books of said defendant and necessary and usual in the course of its business."

1675 10. That the Court erred in overruling, and in not sustaining, defendant's ninth exception to the said Master's report, which exception is in the words and figures following:

"9. For that said Master in said report has failed to allow to the defendant as a credit expenses shown in the Experimental Account on the books of said defendant and necessary and usual in the course of its business."

11. That the Court erred in overruling, and in not sustaining, defendant's tenth exception to the said Master's report, which exception is in the words and figures following:

"10. For that said Master has nowhere in such report allowed to the defendant as a credit losses by it sustained by reason of the depreciation in value of its patents."

12. That the Court erred in overruling, and in not sustaining, defendant's eleventh exception to the said Master's report, which exception is in the words and figures following:

"11. For that said Master has found that the information upon which the witness, William A. Zolg, based his cost figures for the period from March 8, 1911, to August 31, 1912, for the costs of direct labor and material, was obtained by him during the many years he was in charge of the Accounting Department, whereas the record shows that such information was obtained by him only after the Master had ordered the account herein, and was obtained from the Factory Superintendent, and was a matter of which said Zolg had no first hand knowledge."

13. That the Court erred in overruling, and in not sustaining, defendant's twelfth exception to the said Master's report, which exception is in the words and figures following:

"12. For that Master has found that the connection of the witness Zolg with the Toledo Company renders it practically certain that the cost figures furnished by him are not unfair to that company, whereas the testimony and documentary evidence adduced in the case show that such cost figures are too small in amount and erroneous and were furnished to said witness by others and were submitted by such witness just as he received them and without knowledge on his part as to their inaccuracy."

14. That the Court erred in overruling, and in not sustaining, defendant's thirteenth exception to the said Master's report, which exception is in the words and figures following:

"13. For that said Master has found that the cost of labor
1676 and material did not vary materially during the accounting period, and upon such assumption, has fixed the manufacturing costs of cylinder scales in that portion of the accounting period other than that from March 8, 1911, to August 31, 1912, upon the same basis as in the period last mentioned, whereas there is no evidence in the record to support such an assumption."

15. That the Court erred in overruling, and in not sustaining, defendant's fourteenth exception to the said Master's report, which exception is in the words and figures following:

"14. For that said Master has found in Table G in his said report certain amounts under the caption "Factory Overhead" as part of the cost of the manufacture of the infringing scales, which amounts are too low by reason of the fact that the base figures for direct labor and material used by the Master to obtain the proportionate share of total Factory Overhead chargeable to cylinder scales were in themselves too low."

16. That the Court erred in overruling, and in not sustaining, defendant's fifteenth exception to the said Master's report, which exception is in the words and figures following:

"15. For that said report is based upon rulings of said Master wherein he refused to receive in evidence the testimony of the witness O. C. Reeves and the cost sheets of the defendant most closely related to the accounting period in time and the nature of scales concerned in which costs were shown, in order to have a basis of comparison of such estimated costs as between fan and cylinder scales and thus to determine how much difference and shortage there was between the amount of estimated costs and actual costs as shown on the books so as to divide the amount of such shortage between fan and cylinder scales upon an equitable basis, such estimated cost sheets being the source from which the information as to direct labor and material costs was furnished to the witness, William A. Zolg, as to cylinder scales."

17. That the Court erred in overruling, and in not sustaining, defendant's sixteenth exception to the said Master's report, which exception is in the words and figures following:

"16. For that said report is based upon assumptions of the Master as to manufacturing costs, which assumptions were not founded upon evidence in the cause, and that said Master has refused to re-
open the taking of testimony in such cause for the purpose
1677 of taking the testimony of F. S. Johnson and E. Rouse, as requested by the defendant, in order to determine the amount of manufacturing cost of fan scales for the year 1905 and subsequent years, and thus to be able to fix the manufacturing costs of cylinder scales for the accounting period."

18. That the Court erred in overruling, and in not sustaining defendant's eighteenth exception to the said Master's report, which exception is in the words and figures following:

"18. For that said Master has found that the books of the defendant were kept without any effort to distinguish between fan and cylinders as to allowances, and that the great number of transactions that had to be analyzed renders it uncertain whether the allocation made by the defendant's Accountants would produce reasonably accurate results, whereas the evidence discloses that the books of the defendant, and particularly the Customers' Ledger Accounts, showed whether any particular allowance was made upon a fan or cylinder scale, and the Accountants of the defendant for the year 1911 by reference to each of such accounts allocated One Hundred and Seventeen Thousand Eight Hundred and Eighty-five Dollars and Six Cents ($117,885.06) of such allowances as directly chargeable to cylinder scales, which evidence the Master has wholly and without warrant disregarded upon the assumption that the Accountants could not analyze and allocate such items within the time at their disposal, although there is no evidence in the record in support of such assumption."

19. That the Court erred in overruling, and in not sustaining, defendant's nineteenth exception, to the said Master's report, which exception is in the words and figures following:

"19. For that said Master has found the allowances made from the purchase price of cylinder scales as per Table M of such report, and has failed to find that in the year 1911 the amount of such allowances, as specifically allocated as shown by the testimony of W. E. Seatree and J. A. Bowman and Defendant's Exhibit 21, was the sum of One Hundred and Seventeen Thousand Eight Hundred and Eighty-five Dollars and Six Cents ($117,885.06) instead of Ninety Thousand Seven Hundred and Seventeen Dollars and Seventy-four Cents ($90,717.74) as found by the Master, and that the allowance for the other years of such accounting period are shown by the testimony of W. E. Seatree."

20. That the Court erred in overruling, and in not sustain-
1678 ing, defendant's Twentieth exception to the said Master's report, which exception is in the words and figures following:

"20. For that said Master has, in and by such report, having failed to allow to said defendant any credit for the items in Patent Expense

and Experimental Accounts during the accounting period, also failed to allow to said defendant any interest upon the amounts shown in the record as invested by the defendant in the patent and experimental work at the commencement of and during the accounting period."

21. That the Court erred in overruling, and in not sustaining, defendant's Twenty-first exception to the said Master's report, which exception is in the words and figures following:

"21. For that said Master has in such report failed to allow to said defendant any amount for losses by it sustained during the accounting period for depreciation in value of its patents from time to time by reason of the pro rata shortening or lessening of the time for which such patents would continue in force and effect."

22. That the Court erred in overruling, and in not sustaining, defendant's twenty-third exception to the said Master's report, which exception is in the words and figures following:

"23. For that, in and by said report, said Master has failed to find what elements were embodied in the cylinder scales in questions other than the infringing drums or cylinders."

23. That the Court Court erred in overruling, and in not sustaining, defendant's twenty-fourth exception to the said Master's report, which exception is in the words and figures following:

"24. For that, in and by said report, said Master has failed to find that certain patent devices covered by Letters Patent owned by the defendant and shown by the evidence in the cause were embodied in the cylinder scales manufactured and sold by the defendant."

24. That the Court erred in overruling, and in not sustaining, defendant's twenty-fifth exception to the said Master's report, which exception is in the words and figures following:

25. For that, in and by said report, said Master has found that the elements in the cylinder scales in question other than the infringing drums were old and open to the public, and none of them, if
1679 separated from the structure of which it is a part, would in itself be a useable or workable tool, which finding is not supported by the evidence in the cause."

25. That the Court erred in overruling, and in not sustaining, defendant's twenty-sixth exception to the said Master's report, which exception is in the words and figures following:

"26. For that, in and by said report, the said Master has found that the uncontradicted testimony of Dr. Reichmann, and others of defendant's witnesses as to the relative value of the different parts of the complete machine known as the cylinder scale in question was not helpful in an effort to determine whether all or only a portion of the profits on the sales of such scales was due to the patent in question."

26. That the Court erred in overruling, and in not sustaining, defendant's twenty-seventh exception to the said Master's report, which exception is in the words and figures following:

"27. For the said Master has found that the evidence in the case was not sufficient to establish that any portion of the profits is due to causes other than the patent in suit."

27. That the Court erred in overruling, and in not sustaining, defendant's twenty-eighth exception to the said Master's report, which exception is in the words and figures following:

"28. For that said report is based upon a ruling by said Master in which said Master refused to allow the witness, John L. Theobald, called on behalf of the defendant, to testify as to what were the talking points upon which the defendant sold the cylinder scales in question, and because said Master refused to allow said witness to answer such questions."

28. That the Court erred in overruling, and in not sustaining, defendant's twenty-ninth exception to the said Master's report, which exception is in the words and figures following:

"29. For that the said Master, in and by said report, has awarded all the profits on the scales containing the infringing devices to the complainant, whereas the invention in issue relates to a segregable part thereof, and whereas plaintiff has adduced no evidence that the salability of the entire scale is due to said invention."

29. That the Court erred in overruling, and in not sustain-
1680 ing, defendant's thirtieth exception to the said Master's report, which exception is in the words and figures following:

"30. For that, in and by said report, said Master has found that there was no evidence that the salability of said cylinder scales was due to causes other than the indicator drum in issue, whereas he should have shown that the sales of the infringing scales were due to the employment of parts or features other than such indicator drum, such as pendulum system, the platform construction of scale, the honest chart, the front and rear indication, the dash-pot, the leveling device, the electric light attachment, the Gold Finish, the slogan "No Springs—Honest Weight"."

30. That the Court erred in overruling, and in not sustaining, defendant's thirty-first exception to the said Master's report, which exception is in the words and figures following:

"31. For that in said report said Master has failed to find that those parts of the defendant's infringing scale, in addition to the indicator drum in suit, had value independent of their association with the indicator drum, inasmuch as other forms of indicating mechanism which did not embody the invention in issue could be sustituted for the indicator drum in said infringing scales."

31. That the Court erred in overruling, and in not sustaining, defendant's thirty-second exception to the said Master's report, which exception is in the words and figures following:

"32. For that said Master has refused to receive in evidence testimony and documentary evidence offered by the defendant and shown in the record in this cause, and has received in evidence testimony and documentary evidence offered by the plaintiff against the objections of the defendant."

32. That the Court erred in overruling, and in not sustaining, the first of the defendant's additional exceptions to the said Master's report, which exception is in the words and figures following:

"1. For that said Master, having found that all of the cylinder scales manufactured and sold by the defendant had front and back indications substantially as in complianant's Exhibit of Defendant's scale, did not find that such feature constituted a valuable constituent part of such scales, and for that he did not find that such constituent part contributed to the profits realized from the sales of such scales."

1681 33. That the Court erred in overruling, and in not sustaining, the second of the defendant's additional exceptions to the said Master's report, which exception is in the words and figures following:

"2. For that said Master has erroneously interpreted the decision of the Court of Appeals in this case relating to the character and scope of the patent and its far reaching effect in the computing scale art."

34. That the Court erred in approving and confirming the said report of the Master filed in said cause on or about said 6th day of May, 1918.

35. That the Court erred in failing to disapprove and set aside the said report of the Master filed in said cause on or about said 6th day of May, 1918.

36. That the Court erred in finding and holding that the complainant was entitled to recover from the defendant, as the gains and profits made by the said defendant by reason of the infringement of the defendant of the reissued Letters Patent No. 11,536, the sum ascertained and found in the said report of the said Master, with interest thereon from the date of the filing of said report, to the date of the said decree of March 5, 1919, at the rate of five per centum per annum, together with plaintiff's costs and disbursements.

37. That the court erred in decreeing that the plaintiff recover of and from the defendant the sum of Four hundred and Twenty Thousand Eight Hundred and Eighty-Three and 44/100 Dollars, together with interest thereon from the date of the said decree until paid and that the said plaintiff have execution therefor.

38. That the Court erred in decreeing that the plaintiff recover from the defendant its costs and disbursements in the reference before the Master since the 6th day of May, 1914.

39. That the Court erred in decreeing that the plaintiff recover from the defendant any sum whatsoever as gains, profits, damages, interest, costs or disbursements.

ALBERT H. MEADS,
RECTOR, HIBBEN, DAVIS & MACAULEY,
Solicitors for Defendant.

(Endorsed:) Filed March 5, 1919. T. C. MacMillan, Clerk.

1682 And on to-wit: the 11th day of March, 1919, came Toledo Scale Company, as principal and Fidelity & Deposit Company of Maryland, as surety, and filed in the Clerk's office of said Court, in said entitled cause, a certain Bond on Appeal, in words and figures following, to-wit:

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In Equity.

No. 30024.

THE COMPUTING SCALE COMPANY, Plaintiff,

vs.

TOLEDO COMPUTING SCALE COMPANY, Defendant.

Cost Bond on Appeal.

Filed Mar. 11, 1919.

Know All Men by These Presents, that we, Toledo Scale Company, as principal, and Fidelity & Deposit Company of Maryland as Surety, are held and firmly bound to The Computing Scale Company, in the full and just sum of Five Hundred Dollars ($500.00) to be paid to the said The Computing Scale Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, successors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 6th day of March, 1919.

The condition of the above obligation is such, that whereas on or about the 5th day of March, 1919, a decree was entered against the said Toledo Scale Company as defendant in the above entitled cause, and

Whereas said Toledo Scale Company has obtained an order allowing an appeal from said decree to the United States Circuit Court of Appeals for the Seventh Circuit, to reverse the said decree,

Now, therefore, if the said Toledo Scale Company shall prosecute its appeal to effect, and shall answer all costs that may be
1683 awarded against it if it fails to make its plea good, then the above obligation shall be void, but otherwise shall remain in full force and effect.

TOLEDO SCALE COMPANY,
By HENRY THEOBALD,
Pres't.

Attest:
[SEAL.] DANIEL H. KELLY,
Secretary.

[SEAL.] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By ARTHUR C. ARNOLD,
Agent and Attorney-in-Fact.

Approved this 11th day of March, 1919.
K. M. L.,
U. S. District Judge.

(Endorsed:) Filed March 11, 1919. T. C. MacMillan, Clerk.

And on to-wit: the 11th day of March, 1919, came Toledo Scale Company, as principal and Fidelity & Deposit Company of Maryland and United States Fidelity & Guaranty Company, as sureties, and filed in the Clerk's office of said Court, in said entitled cause, a certain Supersedeas Bond in words and figures following, to-wit:

Defendant's Supersedeas Bond.

Filed Mar. 11, 1919.

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In Equity.

No. 30024.

THE COMPUTING SCALE COMPANY, Plaintiff,

vs.

TOLEDO COMPUTING SCALE COMPANY, Defendant.

Supersedeas Bond.

Know All mean by These Presents, That we, Toledo Scale Company, a corporation existing under and by virtue of the laws of the State of New Jersey, the corporate name whereof was formerly Toledo Computing Scale Company, as principal, and Fidelity and Deposit

Company of Maryland, a corporation, and the United States Fidelity and Guaranty Company, a corporation, both of Baltimore,
1684 Maryland, as sureties, are held and firmly bound unto The Computing Scale Company, a corporation existing under and by virtue of the laws of the State of Ohio, in the full and just sum of Four Hundred and Fifty Thousand Dollars ($450,000.00) to be paid to the said The Computing Scale Company its successors or assigns, to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 6th day of March, 1919.

Whereas, heretofore, on March 5, 1919, at a session of the United States District Court for the Eastern Division of the Northern District of Illinois, in a suit pending in said court between the said The Computing Scale Company, plaintiff, and the said Toledo Computing Scale Company, now Toledo Scale Company, defendant, a decree was rendered in favor of said plaintiff, ordering and decreeing that said plaintiff have and recover of the said defendant, Toledo Computing Scale Company, now Toledo Scale Company, the sum of Four Hundred Twenty Thousand Eight Hundred and Eighty-three and 44/100 Dollars ($420,883.44), together with interest thereon from the date of said decree until paid, and also plaintiff's costs and disbursements to be taxed;

And whereas, the said Toledo Computing Scale Company, now Toledo Scale Company, defendant, has prayed and been allowed an appeal from said decree, to the United States Circuit Court of Appeals for the Seventh Circuit;

Now, the condition of the above obligation is such that if the said Toledo Computing Scale Company, now Toledo Scale Company, shall prosecute its said appeal to effect, and shall answer all damages and costs if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

TOLEDO SCALE COMPANY,
By HENRY THEOBALD,
President.

Attest:
[SEAL.] DANIEL H. KELLY,
Secretary.

[SEAL.] FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By ARTHUR C. ARNOLD,
Attorney in Fact.
WILLIAM G. KRESS,
Agent.

1685 [SEAL.] UNITED STATES FIDELITY AND GUARANTY COMPANY,
By HENRY M. MARSHALL AND
GORDON H. FOX,
Attorneys in Fact.

Approved this 11th day of March, 1919.

K. M. L.,
U. S. District Judge.

(Endorsed:) Filed March 11, 1919. T. C. MacMillan, Clerk.

And, to-wit: the 11th day of March, 1919, being one of the days of the regular March term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Kenesaw M. Landis, District Judge, appears the following entry, to-wit:

30024.

COMPUTING SCALE COMPANY
vs.
TOLEDO COMPUTING SCALE COMPANY.

Order of Mar. 11, 1919.

Upon motion of the defendant, it is ordered by the court that the appeal bond in the sum of Five Hundred dollars with Fidelity and Deposit Company of Maryland as surety be and the same is hereby approved and now comes the defendant and this day presents its supersedeas bond for approval in the sum of Four hundred fifty thousand dollars ($450,000.00), with Fidelity and Deposit Company of Maryland, and United States Fidelity and Guaranty Company as sureties. It is ordered by the Court that said bond be and the same is hereby approved.

And afterwards, to-wit: on the 4th day of April, 1919, being one of the days for the regular March term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Kenesaw M. Landis, District Judge, appears the following entry, to-wit:

1686 *Orders of Apr.* 4, 1919, *and June* 4, 1919.

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In Equity.

No. 30024.

THE COMPUTING SCALE COMPANY
vs.
TOLEDO COMPUTING SCALE COMPANY.

Order.

Pursuant to stipulation of the parties filed herein, it is ordered that the defendant's time for filing an abstract of the record with the

clerk of this court, and for docketing its appeal and filing the record on appeal with the clerk of the Court of Appeals, be and the same is hereby extended to and including June 11, 1919.

And afterwards, to-wit: on the 4th day of June, 1919, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable George A. Carpenter, District Judge, appears the following entry, to-wit:

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. 30024.

THE COMPUTING SCALE COMPANY

vs.

TOLEDO COMPUTING SCALE COMPANY.

Order.

Pursuant to the agreement of the parties made in open court, it is ordered that the plaintiff and appellee's time for filing a præcipe for additional portions of the record and for objections to be made or amendments to be proposed to the statement of the evidence be, and the same is, hereby extended to and including July 15, 1919, and that the defendant and appellant's time for filing an abstract of record with the Clerk of this Court and for docketing its ap-
1687 peal and filing the record on appeal with the Clerk of the Court of Appeals, be, and the same is hereby extended to and including July 25, 1919.

O. K.
EDWARD RECTOR,
ALBERT H. MEADS,
Solrs. for Appellant.
ZANE, MORSE & McKINNEY,
Solicitors for Appellee.

And, to-wit: on the 11th day of July, 1919, being one of the days of the regular July term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable George T. Page, Circuit Judge, appears the following entry, to-wit:

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. 30024.

THE COMPUTING SCALE COMPANY
vs.
TOLEDO COMPUTING SCALE COMPANY.

Order of July 11, 1919.

Pursuant to the stipulation of the parties filed herein, it is ordered that the plaintiff and appellee's time for filing a præcipe for additional portions of the record and for objections to be made or amendments to be proposed to the statement of the evidence be, and the same is, hereby extended to and including September 1, 1919, and that the defendant and appellant's time for filing an abstract of record with the Clerk of this Court and for docketing its appeal and filing the record on appeal with the Clerk of the Court of Appeals be, and the same is, hereby extended to and including October 1, 1919.

GEO. T. PAGE,
United States District Judge.

O. K.
ZANE, MORSE & McKINNEY,
Solrs. for Pltff.

O. K.
ALBERT H. MEADS AND
EDWARD RECTOR,
Solrs. for Defts.

1688 And afterwards, to-wit: on the 19th day of September, 1919 being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable George A. Carpenter, District Judge, appears the following entry, to-wit:

Orders of Sept. 19, 1919, *and Oct.* 30, 1919.

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. 30024.

THE COMPUTING SCALE COMPANY
vs.
TOLEDO COMPUTING SCALE COMPANY.

Pursuant to the stipulation of the parties hereto, it is ordered that the time of the respective parties hereto for filing an abstract of Rec-

ord with the Clerk of this Court and for docketing their respective appeals and filing the record on appeal with the Clerk of the Court of Appeals be and the same is hereby extended to and include October 31, 1919.

And afterwards, to-wit: on the 30th day of October, 1919, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Kenesaw M. Landis, District Judge, appears the following entry, to-wit:

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

No. 30024.

THE COMPUTING SCALE COMPANY

vs.

TOLEDO COMPUTING SCALE COMPANY.

Pursuant to the stipulation of the parties hereto, it is ordered that the time of the respective parties hereto for filing an Abstract of Record with the Clerk of this Court and for docketing their respective appeals and filing the record on appeal with the Clerk
1689 of the Court of Appeals be, and the same is hereby extended to and include November 20, 1919.

K. M. L.,
United States District Judge.

O. K.
JOHN M. ZANE,
CHARLES T. MORSE,
Sols. for Deft.

O. K.
EDWARD RECTOR,
ALBERT H. MEADS,
Solrs. for Deft.

And afterwards, to-wit: on the 14th day of November, 1919 being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Kenesaw M. Landis, District Judge, appears the following entry, to-wit:

Order of Nov. 14, 1919.

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

30024.

THE COMPUTING SCALE COMPANY
vs.
TOLEDO COMPUTING SCALE COMPANY.

This day came the parties hereto, by their respective solicitors and presented to the Court the Statement of Evidence in the cas in three bound volumes, and by agreement of said parties, it i hereby ordered that said Statement so presented be, and the same i hereby approved and that the same be filed herein as part of th Record for the purpose of appeal and cross-appeal herein, with th right to either party, under Rule 76, to correct the same shoul errors or omissions be found.

KENESAW M. LANDIS.

1690 And afterwards, to-wit: on the 18th day of Novembe 1910, being one of the days of the regular November, ter of said Court, in the record of proceedings thereof, in said entitle cause, before the Honorable Kenesaw M. Landis, District Judg appears the following entry, to-wit:

Order of Nov. 18, 1919.

In the District Court of the United States for the Northern Distri of Illinois, Eastern Division.

No. 30024.

THE COMPUTING SCALE COMPANY
vs.
TOLEDO COMPUTING SCALE COMPANY.

Pursuant to the stipulation of the parties hereto, it is ordered th the time of the respective parties hereto for filing of transcript record on appeal and for docketing of their respective appeals b and the same is hereby extended to and include December 1, 1919.

K. M. L.

O. K.
JOHN M. ZANE,
CHARLES F. MORSE.

O. K.
EDWARD RECTOR,
ALBERT H. MEADS,
Solrs. for Deft.

And on to-wit: the 29th day of August, 1919, came the plaintiff herein by its attorneys and filed in the Clerk's office of said Court its certain Notice, in words and figures following, to-wit:

1691 *Filed Aug.* 29, 1919.

In the District Court of the United States, Northern District of Illinois, Eastern Division.

In Equity.

No. 30024.

THE COMPUTING SCALE COMPANY, Plaintiff,

v.

TOLEDO COMPUTING SCALE COMPANY, Defendant.

To Edward Rector, Albert H. Meads, and Samuel E. Hibben, Solicitors for Defendant:

Please take notice that a copy of the objections and exceptions prepared by plaintiff to the Statement of Evidence prepared by the defendant, to be used on the appeal in the above cause, has been duly lodged and filed with the Clerk of said District Court above named pursuant to Equity Rule No. 75 on the 29th day of August, 1919, together with a præcipe filed as per the copy hereto attached and that the same are subject to the examination of the defendant and that the plaintiff will ask the Court upon the settlement of said Statement to allow said objections and amendments to said Statement of the Evidence.

CHARLES F. MORSE,
JOHN M. ZANE,
Solicitors for Plaintiff.

Received a copy of the above notice, together with a copy of the attached præcipe this 29th day of August, 1919.

A. H. MEADS,
EDWARD RECTOR,
SAMUEL E. HIBBEN,
Solicitors for Defendant.

(Endorsed:) Filed Aug. 29-1919. John H. R. Jamar, Clerk.

1692 In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In Equity.

No. 30024.

THE COMPUTING SCALE COMPANY, Plaintiff,

vs.

TOLEDO COMPUTING SCALE COMPANY, Defendant.

Præcipe.

Filed May 31, 1919.

To the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division:

In accordance with Equity Rule No. 75 you are respectfully requested to prepare and forward to the Clerk of the United States Circuit Court of Appeals, for the Seventh Circuit a transcript of the record in the above entitled cause for use in connection with the appeal from the decree of this court entered in said cause on or about the 5th day of March, 1919, to be filed in the office of the United States Court of Appeals for the Seventh Circuit under the appeal heretofore perfected, and to include in said transcript the following pleadings, proceedings, papers and exhibits, to wit:

1. Mandate of the United States Circuit Court of Appeals for the Seventh Circuit in said cause issued on or about July 17, 1913, and filed in your office on or about the 5th day of November, 1913.

2. Order entered in said cause on or about November 5, 1913.

3. Statement of evidence taken and filed in said cause pursuant to said order of November 5, 1913, including all exhibits.

4. Motion of plaintiff for rehearing of said cause filed on or about April 22, 1914.

5. Decree entered on May 6, 1914.

6. Statement of the evidence offered before the Master in said cause pursuant to the decree of May 6, 1914, including all exhibits.

7. Report of the Master.

8. Plaintiff's exceptions to Master's report.

1693 9. Defendant's exceptions to Master's report.

10. Decree entered on or about March 5, 1919.

11. Petition on appeal.

12. Assignment of errors.

13. Cost bond on appeal.

14. Supersedeas bond on appeal.

15. Order allowing appeal and supersedeas and approving cost and supersedeas bonds.

16. Orders extending defendant's time for filing abstract of record with Clerk of the District Court and for docketing its appeal and filing the record on appeal with the Clerk of the Court of Appeals.

EDWARD RECTOR,
ALBERT H. MEADS,
SAMUEL E. HIBBEN,
Solicitors for Defendant.

(Endorsed:) Filed May 31, 1919. T. C. MacMillan, Clerk.

Plaintiff's Præcipe for Transcript of Record.

Filed Aug. 29, 1919.

In the District Court of the United States, Northern District of Illinois Eastern Division.

In Equity.

No. 30024.

THE COMPUTING SCALE COMPANY, Plaintiff,

v.

TOLEDO COMPUTING SCALE COMPANY, Defendant.

To the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division:

In accordance with Equity Rule No. 75 you are requested to prepare and forward to the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, in connection with the record on appeal herein and as a part of said record or transcript on appeal, in addition to the papers specified in the præcipe of the defendant appellant above named, the following papers and proceedings:

1. The proposed findings of the defendant filed before the Master on behalf of the defendant on the hearing before said Master.

2. The objection and exceptions to the Master's Report
1694 filed before the Master by the defendant and filed with the Master's Report.

3. Objections and exceptions to the Master's Report filed before the Master by the plaintiff, and filed with the Master's Report.

4. The account filed before the Master on January 15, 1914, or thereabouts, by the defendant and verified by William A. Zolg and filed with the Master's Report.

5. Orders extending plaintiff's time for filing præcipe for record and amendments to the proposed Statement of the Evidence.

CHARLES F. MORSE,
JOHN M. ZANE,
Solicitors for Plaintiff.

(Endorsed:) Filed Aug. 29-1919. John H. R. Jamar, Clerk.

Certificate of Clerk.

NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

I, John H. R. Jamar, Clerk of the District Court of the United State for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Præcipes filed in this Court in the cause entitled The Computing Scale Company, plaintiff, vs. Toledo Computing Scale Company, defendant, Equity No. 30024, as the same appear from the original records and files thereof, now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 25th day of November, A. D. 1919.

[SEAL.] JOHN H. R. JAMAR,
Clerk.

1695 & 1696 Filed Mar. 11, 1919.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Computing Scale Company, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein Toledo Computing Scale Company is appellant and you are appellee to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Kenesaw M. Landis Judge of the District Court of the United States, this 11th day of March, in the year of our Lord one thousand nine hundred and nineteen.

KENESAW M. LANDIS.

Service of the foregoing citation acknowledged this 11th day of March 1919.

ZANE, MORSE & McKINNEY,
Solicitors for Appellee.

(Endorsed:) No. 30,024. District Court of the United States, Northern District of Illinois, Eastern Division. The Computing Scale Co. vs. Toledo Computing Scale Co. Citation. Returnable ——, 191-. ——, Clerk. Filed Mar. 11, 1919, at — o'clock — M. T. C. MacMillan, Clerk.

1697 *Placita.*

Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable Kenesaw M. Landis, District Judge of the United States for the Northern District of Illinois, on 5th day of March, in the year of our Lord one thousand nine hundred and nineteen, being one of the days of the regular March Term of said Court, begun Monday, the 3rd day of March, and of our Independence the 143rd.

Present:

Honorable Kenesaw M. Landis, District Judge.
John J. Bradley, U. S. Marshal.
John H. R. Jamar Clerk.

1698 Filed Sept. 4, 1919.

In the District Court of the United States, Northern District of Illinois, Eastern Division.

No. 30024. Chry.

THE COMPUTING SCALE COMPANY, Plaintiff,

vs.

TOLEDO COMPUTING SCALE COMPANY, Defendant.

Be it remembered that heretofore, to-wit: on the 4th day of September, 1919, came the above named plaintiff, by its solicitors, and filed its Petition for Appeal, as follows:

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In Equity.

No. 30024.

THE COMPUTING SCALE COMPANY, Plaintiff,

v.

TOLEDO COMPUTING SCALE COMPANY, Defendant.

Plaintiff's Petition for Appeal.

Your Petitioner, The Computing Scale Company, represents and shows unto the court that on the fifth day of March, 1919, this court made and entered its final decree in the above action, and that said plaintiff is aggrieved by said final decree for the reasons specified in the assignment of errors which is filed herewith and prays that its appeal be allowed and that citation issue, as provided by law, and that a transcript of the record, proceedings and papers upon which said final decree was made may be sent, duly authenticated, to the United States Circuit Court of Appeals of the Seventh Circuit.

And your petitioner further prays that the proper order
1699 touching the security to be required of it to perfect its appeal be made.

Dated September 4th, 1919.

CHARLES F. MORSE,
JOHN M. ZANE,
Solicitors for the Computing Scale Company.

Order Allowing Appeal.

Ordered that the foregoing appeal be allowed and that the plaintiff file a bond in the sum of five hundred dollars ($500.00) to be appro ed by the court, conditioned as by law provided.

Dated September 4, 1919.

SAMUEL ALSCHULER,
United States District Judge.

(Endorsed:) Filed Sept. 4-1919. John H. R. Jamar, Clerk.

And on to-wit: the 4th day of September, 1919, came the plaintiff herein by its attorneys and filed in the Clerk's office of said Court its certain Assignment of Errors in words and figures following, to-wit:

Plaintiff's Assignment of Errors.

Filed Sept. 4, 1919.

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In Equity.

No. 30024.

THE COMPUTING SCALE COMPANY, Plaintiff,

vs.

TOLEDO COMPUTING SCALE COMPANY, Defendant.

Plaintiff's Assignment of Errors.

Now comes the above-named plaintiff, The Computing Scale Company, by its solicitors, and hereby makes and files the following assignment of errors upon which it will rely upon the prosecution of its appeal from the said final decree made and entered on the fifth day of March, 1919:

1. That the United States District Court for the Northern District of Illinois, Eastern Division, erred in overruling and in not
1700 sustaining the fourth of the plaintiff's exceptions to the report of the Master filed in said cause on the sixth day of May, 1918, which exception is in words and figures as follows:

"Fourth. That the Master has found that during the accounting period the defendant is entitled to charge against profits on cylinder scales interest on investment, found by taking the valuation of the tangible assets of the defendant, excluding therefrom patents and good will, and apportioning that total interest so found to cylinder scales in the respective years on the basis of gross sales. The plaintiff excepts thereto on the ground that the method of ascertaining the whole investment is incorrect and the method of ascertaining investment for cylinder scale production is incorrect, and that there is no proof in the record that any part of any alleged investment was caused or rendered necessary by cylinder scale business, and any apportionment should be made on the basis of net sales which alone produce revenue to pay interest, and the Master by reducing the interest charge against scales made by the defendant, other than cylinder scales, has allowed defendant to obtain a positive benefit from the infringing business by charging against the profits from infringing scales a portion of the interest on its investment existing when the manufacture and sale of infringing scales was begun and thereby has relieved scales, other than infringing, of a part of the interest charge that they would have been compelled to bear if the infringing business had not been begun; moreover, the

alleged increase in investment of the defendant is shown by the books of the defendant to have been made out of money borrowed on bills payable, and an allowance for interest actually paid, apportioned according to net sales, would therefore be entirely just. The finding of the Master, to which this exception applies, results in a total interest charge for the years 1906, 1907, 1908, 1909, 1910, 1911 and 1912 (8 months) apportionable to cylinder sales of $114,141.18, as shown in "Table N" on page 26 of the Master's report; whereas the Master should have found that the interest chargeable for said years respectively was interest actually paid as shown by the books of defendant, apportionable to cylinder sales on the basis of net sales (which alone produce revenue to pay interest), resulting as follows:

1701	Interest actually paid by defendant.		Percentage of net sales of cylinder scales to total net sales.	Apportionable to cylinder sales.
1906	$4,835.42	of which	1.14% =	$55.12
1907	5,716.83	" "	26.00% =	1,486.38
1908	9,671.85	" "	51.66% =	4,996.48
1909	17,150.26	" "	48.80% =	8,369.33
1910	24,129.42	" "	59.46% =	14,347.35
1911	28,432.90	" "	60 40% =	17,173.47
1912 (8 mo.)	18,947.80	" "	58.76% =	11,133.73
Total				$57,561.86

The difference between the total interest charge, apportionable to cylinder sales, found by the Master and the charge, apportionable to cylinder sales, that should be allowed for interest actually paid, is the difference between $114,141.18 and $57,561.86, which difference is $56,579.32, which should be added to the profits in cylinder scales shown in the Master's report."

2. That the said District Court erred in allowing against the gains and profits found by the said Master the sum of fifty-six thousand five hundred and seventy-nine and 32/100 dollars ($56,579.32) on account of expenses erroneously allowed as interest upon investment for expenses to defendant chargeable against sales of infringing scales, erroneously allowed in said Master's account as interest on investment and by the said Master deducted from the gains and profits found by said Master.

3. That the said District Court erred in overruling and in not sustaining the fifth of plaintiff's exceptions to the said report of the Master, which exception is in words and figures as follows:

"Fifth. That the Master has found that the plaintiff is not entitled to any of the Canadian profit for the years 1908, 1909, 1910, 1911 and 1912 (8 mo.); whereas the Master should have found:

(*a*) That all of the Canadian sales were made from Toledo and in point of law were sales made in the United States where the orders were accepted, the invoicing and billing made and all accounts of selling such scales entered and carried, and collections therefor made;

(*b*) That by reason of the fact that necessary parts of the infringing scales were made at Toledo and shipped from Toledo to the assembling factory in Canada for use in assembling infringing scales there, in point of law such fact renders all such scales
1702 put together in Canada accountable for as if all made in the United States;

(*c*) That the accounts as to such Canadian sales were inextricably mingled on the books of the defendant with the accounts as to United States sales;

(*d*) That the whole of the Canadian profit on cylinder scales, shown by the books of the defendant to be $56,141.24, should be accounted for by the defendant as profits on infringing scales, from which should be deducted, of course, the amount of commercial and selling overhead expenses applicable to Canadian business in the sum of $40,492.48, found by the Master on pages 29 to 34, inclusive, of his report and summarized in "Table Q" on page 34 of said report, and by the Master allowed and added in his statement of the account of profits on cylinder scales, for the reason that said sum of $40,492.48 had been deducted from cylinder business other than Canadian business, whereas it should have been deducted from Canadian business. This leaves a net amount of $15,648.76 of Canadian profit to be added to the Master's statement of account of profits."

4. That the said District Court erred in not adding to the gains and profits as found by said Master the sum of fifteen thousand six hundred and forty-eight and 76/100 dollars ($15,648.76) of profit upon Canadian business erroneously disallowed by the Master in his said report.

5. That the said District Court erred in overruling and in not sustaining the seventh exception of the plaintiff to be said Master's report, which exception is in words and figures as follows:

"Seventh. That the Master has not found that the defendant is accountable for the values in cash of second-hand scales as shown by the totals of the allowance accounts as the amounts in cash at which the defendant acquired the exchange scales in exchange for property as to which the defendant was a trustee for the plaintiff, the result of which would be an addition to profits for the infringing period of the sums of $211.52 for 1906, $6,431.75 for 1907, $42,828.86 for 1908, $40,396.26 for 1909, $60,268.58 for 1910, $90,717.74 for 1911 and $53,811.56 for 1912 (8 mo.), making a total of $294,666.27, from which should be deducted the sum of $197,493.93 on account of second-hand sales for the infringing period, making a net addition to profits of $97,172.34, to be added to the profits found in the Master's report."

6. That the said District Court erred in not adding to the gains and profits found by the said Master the sum of ninety-seven
1703 thousand one hundred and seventy-two and 34/100 dollars, ($97,172.34), being the defendant's valuation as a cash de-

duction from the selling price of infringing scales for second-hand scales taken by said defendant in exchange for infringing scales over and above the amount realized from sales of such scales taken in exchange for infringing scales, because, as shown by the evidence, a large part of said second-hand scales was wantonly destroyed by the defendant.

7. That the said District Court erred in overruling and in not sustaining plaintiff's eighth exception to the said Master's report, which exception is in words and figures as follows:

"Eighth. That the Master has found that plaintiff is not entitled to profit upon 1839 cylinder scales on hand on the close of the accounting period; whereas the Master should have found that the plaintiff is entitled to have the defendant account for said 1839 scales at a profit of approximately $20. per scale which amount of profit on scales on hand was $36,780 and should be added to the profits found by the Master on cylinder scales."

8. That the said District Court erred in not adding to the gains and profits found by the Master the sum of thirty-six thousand seven hundred eighty dollars ($36,780.00) being the defendant's profit in 1839 infringing scales on hand at the end of the accounting period and afterwards disposed of by the defendant.

9. That the said District Court erred in overruling and in not sustaining defendant's twelfth exception to the said Master's report, which exception is in words and figures as follows:

"Twelfth. That the Master has found that the defendant is not required to account for the gain and advantage in good will of a business in infringing scales obtained by means of the continuous infringement of the defendant during the accounting period which gain or advantage remained to the defendant at the end of the accounting period; whereas the Master should have found:

(a) That the decree of this court made and entered June 25, 1912, granted a perpetual injunction restraining the defendant from making, using or vending any of the infringing scales; that upon the petition of the defendant stating that the patent infringed would expire by limitation on September 3, 1912, and that such injunction would irreparably damage the defendant's business as a going concern, the said injunction was suspended pending appeal, by
1704 order of this Court made and entered on said June 25, 1912, and that said defendant's business in infringing scales continued without interruption until and after September 3, 1912, when the patent expired by limitation and that the good will of said infringing business remained to the defendant on said last named day as a valuable asset obtained by the defendant by means of the expenditures prior thereto during the accounting period which expenditures had been allowed to the defendant as charges against the profits on infringing scales and that a benefit, gain, and advantage resulted to defendant therefrom from the fact that the benefit of expenditures

lowed to defendant during the infringing period continued to the efendant after the accounting period expired by reason of the xpiration of the patent;

(*b*) That the patent having expired before a perpetual injunction as enforced, the defendant obtained as a gain from its infringement going business in scales theretofore infringing which going busiess had been established through the infringement, the expenses of stablishing which had been paid for by its whole business, and the roportionate part of which had been allowed as expenditures against nfringing scales and against the profits on the infringing business; hat certain of such expenditures allowed, namely, advertising and ranch office expenses, were expenditures of which defendant would njoy the benefit after the accounting period had expired as shown y the evidence; and that, as shown by the evidence, a fair method f allowing for some of the defendant's said gain is to distribute exenditures of permanent benefit, such as advertising and branch ffice expenses, one-fifth to the year in which the expenditures *was* nade and one-fifth to each of the succeeding four years;

(*c*) That as shown by the evidence, the advertising expenses llowed, beginning with the year 1908 and through the rest of the ccounting period, were as follows, from which have been deducted he following amounts allowed for Canadian expense so as to show mounts of advertising expense actually allowed against the whole usiness in scales sold in the United Statesc:

908.....	Advertising	$15,048.45,	deduct	1.77%	leaving	$14,782.09
909.....	"	19,777.36,	"	6.22%	"	18,547.21
910.....	"	26,986.86,	"	8.15%	"	24,787.43
911.....	"	35,349.47,	"	11.70%	"	31,213.58
912 (8 mo.).....	"	23,173.49,	"	12.01%	"	20,390.35

1705 Of these amounts the following percentages have been allowed against cylinder scale sales:

1908.....	$14,782.09	of which	charged	to	cylinders	50.83%.....	$7,513.74
1909.....	18,547.21	"	"	"	"	49.58%.....	9,195.71
1910.....	24,787.43	"	"	"	"	60.11%.....	14,899.72
1911.....	31,213.58	"	"	"	"	60.99%.....	19 037.16
1912(8mo.)	20,390.35	"	"	"	"	59.36%.....	12,103.71

This advertising expense distributed on the five-year basis would mount to the following sums which should be carried over to the eriod succeeding the close of the accounting period and therefore hould be deducted from the expense allowed, or what is the same hing, should be added to the profits found by the Master:

1908.....	$7,513.74	carry over		1/15	thereof.....	$500.92
1909.....	9,195.71	"	"	4/15	"	..... 2,452.19
1910.....	14,899.72	"	"	7/15	"	..... 6,953.20
1911.....	19,037.16	"	"	10/15	"	..... 12,691.44
1912 (8 mo.).....	12,103.71	"	"	12/15	"	..... 9,682.97
Total of advertising carried over.....						$32,280.72

Branch office expenses suffered no deduction for Canadian bus
ness, and the year, the amount of those expenses, the percentag
charged to cylinder sales, the amount thus charged, to cylinder sale
the amount thus charged, the fraction thereof to be carried over
the period succeeding the accounting period and the amount th
to be carried over are given in the following table:

1908.....	$43.911.03	50.83%	$22.319.98	1/15	thereof.....	$1,488.
1909.....	57,902.22	49.58%	28,707.92	4/15	"	7,655.
1910.....	83,157.90	60.11%	49,986.21	7/15	"	23,326.
1911.....	115,173.59	60.99%	70,244.37	10/15	"	46,829.
1912 (8 mo.).	66,654.29	59.36%	39,565.99	12/15	"	31,652.
Total of branch office expense carried over.....						$110,952.

The total of advertising and branch office expenses to be thus ca
ried over is $143,233.43, for which the claim of the plaintiff for a
allowance of $100,000 is reasonable, and said $100,000 should b
added to cylinder scale profits as an allowance in part for that po
tion of the advertising and branch office expenses which shoul
equitably be carried over to the period succeeding the accountin
period, the gain, value, or advantage whereof was enjoyed by the d
fendant after the close of the accounting period, or as an equivale
for part of the good will acquired by the infringement."

10. That the said District Court erred in not adding to the gain
and profits found by the Master in his said report the sum
1706 one hundred thousand dollars ($100,000.00) as a gain an
advantage of the good will of a business in infringing scal
obtained by means of the continuous infringement of the defenda
during the accounting period, which infringing business was begu
during the accounting period.

11. That the said District Court erred in overruling and in n
sustaining defendant's thirteenth exception to the Master's said r
port, which exception is in words and figures as follows:

"Thirteenth. That the Master has not added to the total profi
shown by his accounting the following amounts, making the profi
the following total:

Total profits shown by the Master.....	$404,101.9
Additional profits taken by excessive interest allowances	56,579.3
Additional profits on Canadian sales.....	15,648.3
Additional profits taken on exchange allowances....	97,172.3
Additional profits or damages, scales on hand.....	36,780.0
Additional gain obtained by expense producing Good Will	100,000.0
Total Profits	$710,282.3

12. That the said District Court erred in not finding that the tot
gains and profits made by the defendant during the infringing p

riod was the sum of seven hundred and ten thousand two hundred eighty-two and 39/100 dollars ($710,282.39) and in not decreeing that the plaintiff do have and recover from the defendant the said sum of seven hundred ten thousand two hundred eighty-two and 39/100 dollars ($710,282.39) with interest thereon at the rate of five per cent. (5%) per annum from the sixth day of May, 1918, the date of the filing of said Master's report.

Wherefore the said plaintiff prays that the said final decree may be reversed by being modified to allow the various additions to the gains and profits of the defendant specified in the above assignments of error, or such of them as may be found to be just, and that the said final decree may be ordered to be entered for the said gains and profits in accordance with such modifications.

CHARLES F. MORSE,
JOHN M. ZANE,
Solicitors for the Computing Scale Company.

(Endorsed:) Filed Sept. 4, 1919. John H. R. Jamar, Clerk.

1707 And on to-wit: the 4th day of September, 1919, come The Computing Scale Company, as principal and American Surety Company of New York, as surety, and filed in the Clerk's office of said Court, in said entitled cause, a certain Bond on Appeal in words and figures following, to-wit:

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In Equity.

No. 30024.

THE COMPUTING SCALE COMPANY, Plaintiff,

vs.

TOLEDO COMPUTING SCALE COMPANY, Defendant.

Bond for Costs on Appeal.

Filed Sept. 4, 1919.

Know All Men by These Presents, That we, The Computing Scale Company, a corporation of the State of Ohio, as Principal, and American Surety Company of New York, a corporation of the State of New York, as Surety, are held and firmly bound unto Toledo Scale Company, a corporation of the State of New Jersey, the corporate name whereof was formerly Toledo Computing Scale Company, in the full and just sum of five hundred dollars ($500.00), to be paid to the said Toledo Scale Company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves and our successors, jointly and severally, firmly by these

presents. Sealed with our seals and dated this fourth day of September, 1919.

Whereas, on the fifth day of March, 1919, a decree was entered in the above entitled cause and the said The Computing Scale Company has obtained an order allowing an appeal from said decree to the United States Circuit Court of Appeals for the Seventh Circuit;

Now, the condition of the above obligation is such, that if the said The Computing Scale Company shall prosecute its said appeal to effect, and shall answer all costs that may be awarded
1708 against it if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

THE COMPUTING SCALE COMPANY,
By SAMUEL M. HASTINGS,
President.

Attest:
[SEAL.] GEORGE W. KEPLER,
Secretary.

AMERICAN SURETY COMPANY OF NEW YORK,
By STANLEY A. BERRY,
Resident Vice President.

Attest:
JAY G. REYNOLDS,
Resident Assistant Secretary.

Approved September 4, 1919.
SAMUEL ALSCHULER,
Judge.

(Endorsed:) Filed Sept. 4, 1919. John H. R. Jamar, Clerk.

And on, to-wit: on the 4th day of September, 1919, being one of the days of the regular September term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Samuel Alschuler, District Judge, appears the following entry to-wit:

Order of Sept. 4, 1919

Thursday, September 4, 1919.

Chy. 30024.

COMPUTING SCALE COMPANY

vs.

TOLEDO COMPUTING SCALE COMPANY.

ALSCHULER, *J.*:

Now comes the plaintiff herein and this day presents to the Court its petition for appeal and assignments of error and moves the Court

r the allowance of an appeal to the United States Circuit Court of ppeals from the decree heretofore entered herein.
It is ordered by the Court that said appeal be and the same hereby allowed to the United States Circuit Court of Appeals upon said aintiff filing bond in the sum of Five hundred dollars ($500.00), th surety to be approved by the Court.

709 And, to-wit: on the 19th day of September, 1919, being one of the days of the regular September term of said Court, in e record of proceedings thereof, in said entitled cause, before the Honorable George A. Carpenter, District Judge, appears the follow-g entry, to-wit:

Order of Sept. 19, 1919.

n the District Court of the United States for the Northern District of Illinois, Eastern Division.

In Equity.

No. 30024.

THE COMPUTING SCALE COMPANY

vs.

TOLEDO COMPUTING SCALE COMPANY.

Order.

Pursuant to the stipulation of the parties hereto, it is ordered that he time of the respective parties hereto for filing an abstract of Record with the Clerk of this Court and for docketing their respective ppeals and filing the record on appeal with the Clerk of the Court f Appeals be, and the same is hereby extended to and include October 31, 1919.

And, to-wit: on the 30th day of October, 1919, being one of the days of the regular October term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Kenesaw M. Landis, District Judge, appears the following entry, to-wit:

1710 *Order of Oct. 30, 1919.*

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In Equity.

No. 30024.

THE COMPUTING SCALE COMPANY, Plaintiff,

vs.

TOLEDO COMPUTING SCALE COMPANY, Defendant.

Order.

Pursuant to the stipulation of the parties hereto, it is ordered that the time of the respective parties hereto for filing an Abstract of Record with the Clerk of this Court and for docketing their respective appeals and filing the record on appeal with the Clerk of the Court of Appeals be, and the same is hereby extended to and include November 20, 1919.

K. M. L.,
United States District Judge.

O. K.
JOHN M. ZANE,
CHARLES F. MORSE,
Sol's for Plff.

O. K.
EDWARD RECTOR,
ALBERT H. MEADS,
Sol'rs for Deft.

And afterwards, to-wit: on the 14th day of November, 1919, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Kenesaw M. Landis, District Judge, appears the following entry, to-wit:

1711 *Order of Nov.* 14, 1919.

In the District Court of the United States for the Northern District of Illinois, Eastern Division.

In Equity.

No. 30024.

THE COMPUTING SCALE COMPANY, Plaintiff,

vs.

TOLEDO COMPUTING SCALE COMPANY, Defendant.

This day came the parties hereto, by their respective solicitors, and presented to the Court the Statement of Evidence in the case in three bound volumes, and by agreement of said parties, it is hereby ordered that said Statement so presented be, and the same is hereby approved and that the same be filed herein as part of the Record for the purposes of appeal and cross-appeal herein, with the right to either party, under Rule 76, to correct the same should errors or omissions be found.

KENESAW M. LANDIS.

Certificate of Clerk.

NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

I, John H. R. Jamar, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of Petition for Appeal, Assignment of Errors, Order, Bond and Citation, filed and entered on behalf Computing Scale Company, in this Court in the cause entitled Computing Scale Company, plaintiff, vs. Toledo Computing Scale Company, defendant, Equity, No. 30024, as the same appear from the original records and files thereof, now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 14th day of November, A. D. 1919.

[SEAL.] JOHN H. R. JAMAR,
Clerk.

1712 & 1713 Filed Sept. 4, 1919.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Toledo Computing Scale Company (now Toledo Scale Company), Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Seventh Circuit, to be holden at Chicago, within thirty days from the date hereof, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the Northern District of Illinois, Eastern Division, wherein The Computing Scale Company is appellant and you are appellee to show cause, if any there be, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Alschuler, Judge of the District Court of the United States, this 4th day of September, in the year of our Lord one thousand nine hundred and nine.

SAMUEL ALSCHULER,
Judge.

Service of the above citation admitted by service of copy and accepted on behalf of the appellee this 4th day of September, 1919.

EDWARD RECTOR,
ALBERT H. MEADS,
Solicitors for Appellee.

(Endorsed:) Original. No. 30,024. District Court of the United States, Northern District of Illinois, Eastern Division. The Computing Scale Company, Plaintiff, vs. Toledo Computing Scale Company, Defendant. Citation. Filed Sep. 4, 1919, at — o'clock — M. John H. R. Jamar Clerk.

2897

1714

J. S. & E. B. LAKE.

Weighing Scale.

55,503.

Patented June 12, 1866.

FIG. 1.

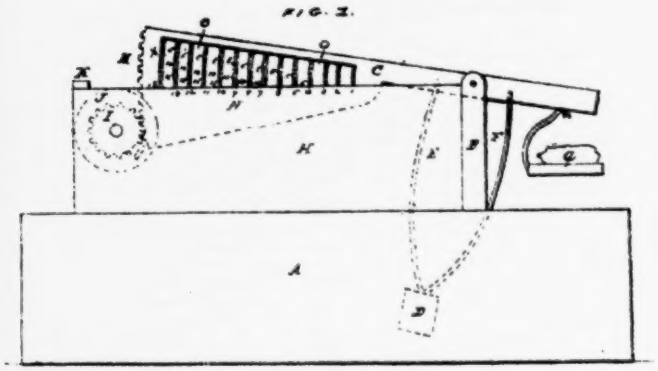
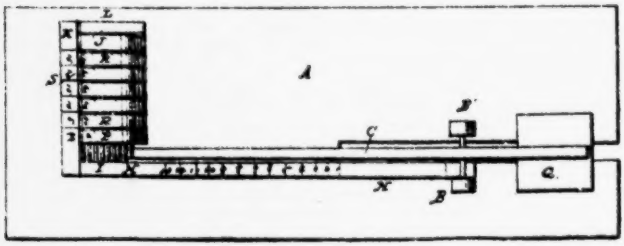


FIG. 2.



WITNESSES:

J. H. Blanchard

Jas A. Pennell

INVENTOR.

J. S. Lake

E. B. Lake

Per Munn & Co

attys

2898

UNITED STATES PATENT OFFICE.

JESSE S. LAKE, OF SMITH'S LANDING, AND EZRA B. LAKE, OF BRIDGEPORT, NEW JERSEY.

IMPROVEMENT IN WEIGHING-SCALES.

Specification forming part of Letters Patent No. **55,302**, dated June 12, 1866.

To all whom it may concern:

Be it known that we, JESSE S. LAKE, of Smith's Landing, in the county of Atlantic and State of New Jersey, and EZRA B. LAKE, of Bridgeport, in the county of Gloucester and State of New Jersey, have invented a new and useful Improvement in Weighing-Scales; and we do hereby declare that the following is a full, clear, and exact description thereof, which will enable others skilled in the art to make and use the same, reference being had to the accompanying drawings, forming part of this specification, in which—

Figure 1 is a side view of a weighing-scale illustrating our invention. Fig. 2 is a plan or top view of the same.

Similar letters of reference indicate like parts.

The object of our invention is to furnish a weighing-scale which shall indicate both the weight of the article and its value at any given rate per pound; and it consists in combining with the beam or lever of a weighing-scale a calculated table so graduated and arranged as to show the value of the amount weighed at a given price per pound.

A is the box or platform upon which the scale is set. B B' are standards, to which the lever or scale-beam C is pivoted. D is the balance-weight of the scale, which is supported by the rods E F, attached to the lever or scale-beam C, one on each side of the pivoting-point of said beam. G is the scale-pan, upon which are placed the articles to be weighed, and which is pivoted to the forward end of the scale-beam C. H is a partition or beam, the upper edge of which serves as a pointer or index to mark the weight of the article weighed upon the scale M, formed upon the side of the beam C. Thus, as the beam H stands in Fig. 1, the article upon the scale-pan weighs one and a half pounds. The numbers on scale N, on the upper edge of the beam or partition H, indicate the price per pound at which various articles may be sold. Upon the side of the beam C, opposite the numbers of the scale N, are formed scales O, in each of which the space or area through which the beam C moves in passing from the zero point to the point 1 of the scale M is divided up into as many subdivisions as here are units in the number opposite which the said scale is formed. Thus in the scale O, opposite the number 12 of the scale N, the space through which that part of the beam C passes in weighing a pound is divided into twelve subdivisions, as shown. In weighing a pound and a half the upper end of the beam H would stand at the eighteenth division-mark, which would show the price of a pound and a half at twelve cents or twelve dollars per pound, the scales O thus becoming tables to show the price of the quantity weighed at a given rate per pound.

For convenience in reading, the scale M of weights is numbered every half-pound and the scales O of prices at every fifth division-mark.

The end of scale beam or lever C is toothed, as shown in Fig. 1. These teeth work into the teeth of the gear-wheel I and cause it to revolve with the change of position of the beam C. Attached to the gear-wheel I, and revolving with it, is a cylinder, J, upon the surface of which are arranged various scales. The one, P, nearest the right-hand end of the cylinder, shows the weight of the article, and in the drawings is divided up into division-marks of one-quarter of a pound each. The others, R, on the cylinder, indicate the amount for which the quantity weighed should be sold at a given rate per pound. The scale upon the beam K is the scale S of prices per pound.

It should be observed that the scales M N O are to be used when the weight of the article and the price are both small; but when heavier articles are to be weighed the balance-weight D may be replaced by a larger one in the ordinary manner, or an additional weight may be added to the weight D. In this case the scales P R S must be used.

The gear-wheel I and cylinder J revolve in bearings, one in the partition H and the other in the standard L, erected on the platform or box A at the farther end of the cylinder J.

The number of the scales upon the scale-beam C and the cylinder J, and the extent to which their subdivision is carried, will depend upon the size of the scales and the use to which they are to be applied.

We claim as new and desire to secure by Letters Patent—

1. The combination, with the beam or lever C and beam or partition H of a weighing-scales,

of the scales M N O, constructed and arranged substantially as described and for the purpose set forth.

2. The combination of the cylinder J and cog-wheel I with the toothed end of the beam or lever C, substantially as described and for the purpose set forth.

3. The combination, with the cylinder J and beam K of the weighing-scales, of the tables P R S, constructed and arranged substantially as described and for the purpose set forth.

JESSE S. LAKE.
EZRA B. LAKE.

Witnesses:
WILSON KERR,
ALFRED FISLER.

1718

(No Model.)

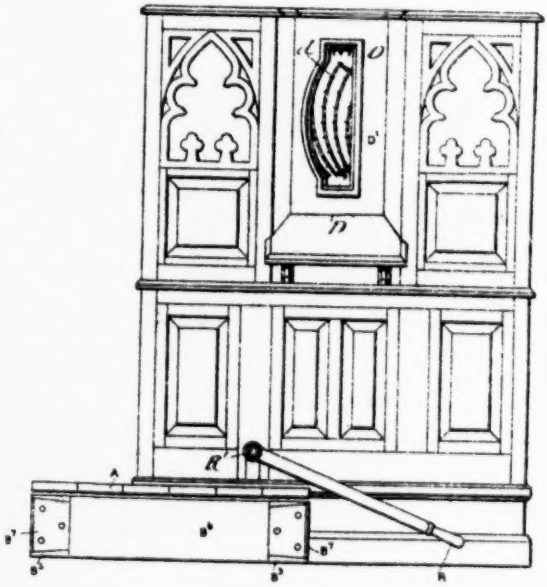
7 Sheets—Sheet 1.

E. WÖLNER.

WEIGHING MACHINE.

No. 384,659. Patented June 19, 1888.

Fig 1



Witnesses

James F. Dostamel

Alan S. Dodger

Inventor.

Eugen Wölner,

by Dodger Bro.

his Attys.

2901

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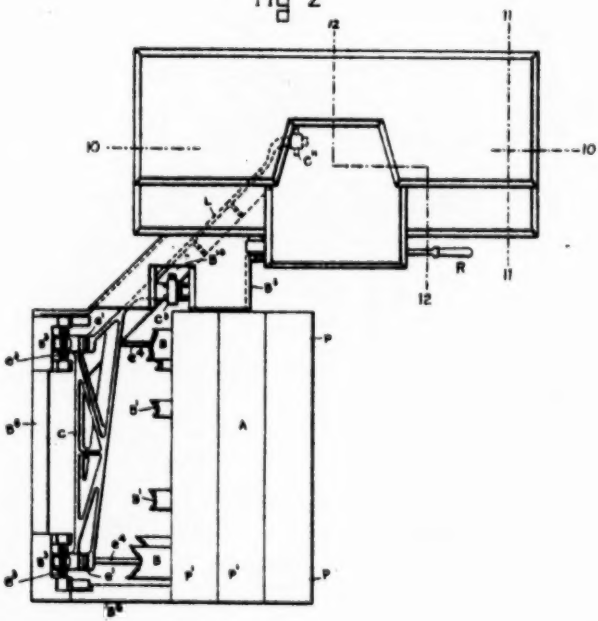
(No Model.) 7 Sheets—Sheet 2.

E. WÖLNER.

WEIGHING MACHINE.

No. 384,659. Patented June 19, 1888.

Fig 2



Witgesses

James F. Dashiell

Walter D. Dodge

Igveytor.

Eugen Wölner,
by Dodger Son,
his Attys.

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(No Model.) 7 Sheets—Sheet 3.

E. WÖLNER.

WEIGHING MACHINE.

No. 384,659. Patented June 19, 1888.

Fig. 6.

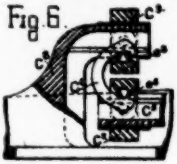
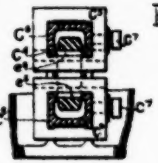


Fig. 7.



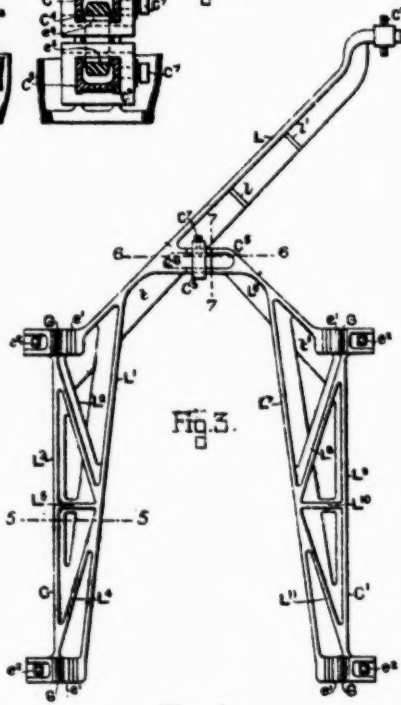
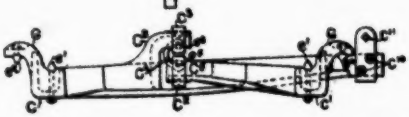


Fig. 6.

Fig. 3.

Fig. 4.



Witnesses.

James F. Dunham.

Walter S. Dodge.

Inventor

Eugen Wölner,

by Dodger Son

his Attys.

2903

(No Model.) 7 Sheets—Sheet 4.

E. WÖLNER.

WEIGHING MACHINE.

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No. 384,659. Patented June 19, 1888.

Fig 8

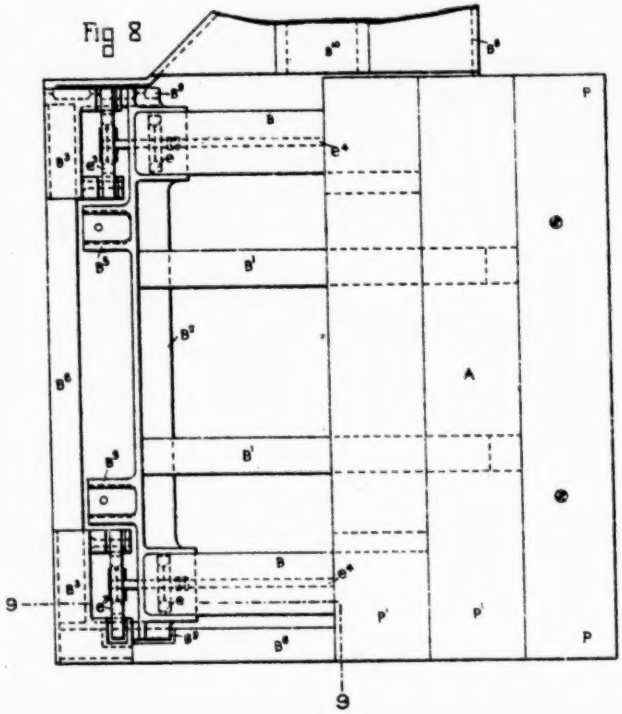
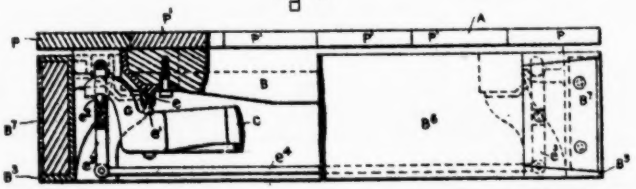


Fig 9



Witnesses.

James L. Norris

Walter S. Dodge

Inventor

Eugene Wölner,

by Dodger Sons

& Attys.

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(No Model.)

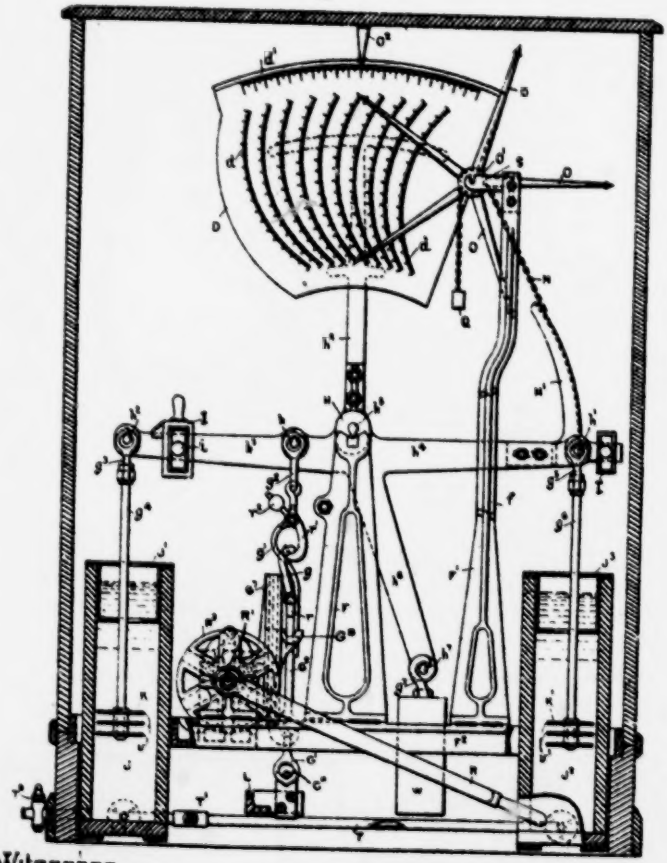
7 Sheets—Sheet 3.

E. WÖLNER.

WEIGHING MACHINE.

No. 384,659. Patented June 19, 1888.

Fig 10



Witgesses.
James F. Hamel
Walter S. Dodge

Inventor.
Eugen Wölner,
by Dodger Co.
his Attys.

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(No Model.) 7 Sheets—Sheet 6.

E. WÖLNER.

1728

WEIGHING MACHINE.

No. 384,659. Patented June 19, 1888.

Fig 11

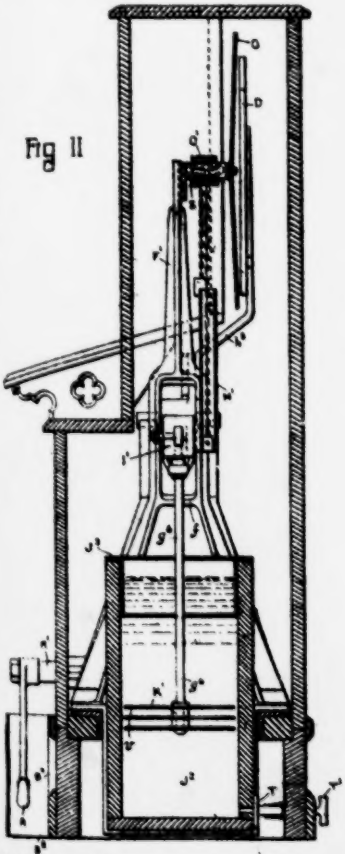
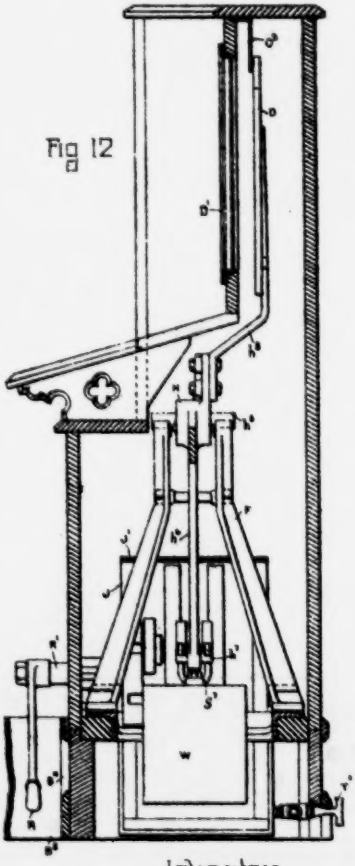


Fig 12



Witnesses.
James E. DeHamel
Walter S. Dodge

Inventor
Eugene Wölner,
by Dodger Son,
his Attys.

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(No Model.)

7 Sheets—Sheet 7

E. WÖLNER.

WEIGHING MACHINE.

No. 384,659. Patented June 19, 1888.

Fig. 15

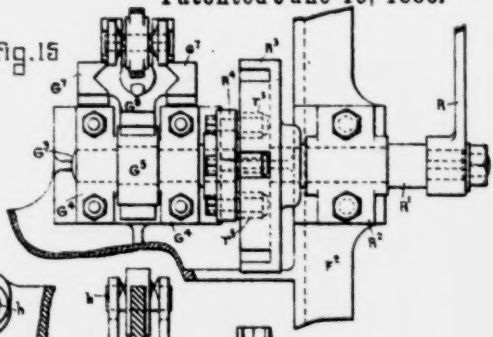

Fig. 16

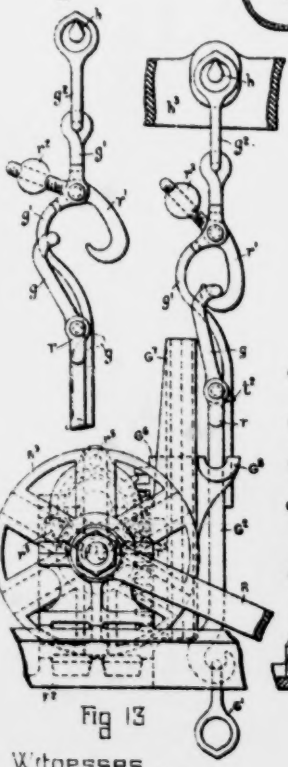

Fig. 17

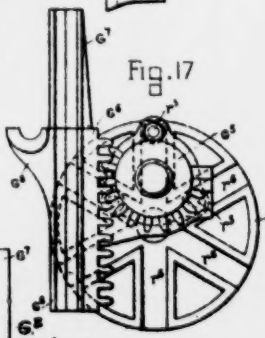

Fig 13

Fig 14

Witnesses
James P. DeHamel
Walter J. Dodge

Inventor:
Eugen Wölner,
by Dodger Son,
his Attys

2907

1731

UNITED STATES PATENT OFFICE.

EUGEN WÖLNER, OF LIVERPOOL, COUNTY OF LANCASTER, ENGLAND.

WEIGHING-MACHINE.

SPECIFICATION forming part of Letters Patent No. 384,659, dated June 19, 1888.

Application filed November 8, 1888. Serial No. 318,119. (No model.)

To all whom it may concern:

Be it known that I, EUGEN WÖLNER, a subject of the King of Sweden and Norway, residing at Liverpool, in the county of Lancaster, in the Kingdom of England, have invented certain new and useful Improvements in Weighing-Machines, of which the following is a specification.

This invention relates to that class of machines for which I have already obtained Letters Patent of the United States No. 294,713, and is best described by aid of the accompanying drawings, which is made in two scales.

Figure 1 is a front elevation of my apparatus. Fig. 2 is a general plan on the same scale, with half of the platform and the cover over the lever-coupling removed, showing the machine box and lever. Figs. 3 and 4 are respectively a plan and elevation of machine-levers. Fig. 5 is an enlarged cross-section of lever on the line 5 5, Fig. 3. Figs. 6 and 7 are sectional views, on an enlarged scale, on the lines 6 6 and 7 7, respectively, of Fig. 3; Fig. 8 an enlarged plan view, and Fig. 9 a sectional view, of the weighing-machine itself on the line 9 9 of Fig. 8. Fig. 10 is partly a transverse section and partly an elevation on the line 10 10 of Fig. 2, showing indicating apparatus and relieving apparatus. Fig. 11 is a sectional end elevation of indicating apparatus on the line 11 11 of Fig. 2. Fig. 12 is a sectional end elevation of indicating apparatus on the line 12 12 of Fig. 2. Figs. 13, 14, 15, 16, and 17 are respectively elevations and plan of the relieving apparatus on an enlarged scale.

In the drawings, A is the weighing table or platform, with beams B and B', the former of which are secured at each end to two cross-beams, B', Fig. 8, one at each side of platform A, having small shoes *e* at each end, and the whole resting on the knife-edges e' of the levers C and C', Figs. 2, 4, and 9. The limbs of the levers C C' have the cross-section of the letter L, this form being the best to resist the strains they are required to withstand, and easy to mold, the major lever C, consisting of the main limb L, being in a diagonal direction, with strengthening-webs *l* L, and the minor limbs L' L', with the stay-limbs L² L' L³ and the hanger-shaped ends G, which are provided with knife-edges e^3, forming fulcrums. In the pattern for casting the limb L' is placed centrally between the knife-edges e' e^3, and rests on the bottom flange of limb L and joins limb L' on the other side. Limb L' rests also on bottom flange of limb L. L' and L' are joined by the diagonal stay-limbs L² and L³, and also by the central stay-limb, L⁴. The limb L' is at an angle to the limb L², and held together by the said stay-limbs L², L', and L³, and forms a strong beam, both to resist torsional as well as bending strains. The reason why one flange rests on the other, instead of running into the other, is that the pattern by this means is stronger and easier to make; otherwise all the flanges could be in the same plane, running into each other. The minor lever C' is built up exactly in similar manner, and consists of the main limb L⁵ and the minor limbs L' L⁵, with the stay-limbs L⁵ L'' L⁶, and the hanger shaped ends G, provided with knife-edges e^3, forming fulcrums. On limb L of major lever C is a short arm, C⁵, that is cored out to make room for the coupling-link C⁶, Fig. 6, and on C⁵ is fitted a muff, C⁸, provided within, on the bottom side, with a knife-edge, e^8, and this muff C⁸ is just set in the desired position and secured by the set-screw C⁷, Figs. 3 and 7. In casting, the short arm C⁵ can be fixed on the pattern at any desired point on the limb L. If C⁵ is brought low down on the pattern nearer the hanger G, this will suit a shorter machine, and if C⁵ is fixed on the pattern higher up on the limb L, nearer the center of suspension C'', it will adapt itself to a longer machine. Again, if hanger G on limb L' of major lever C and hanger G on limb L' of minor lever C' are brought farther out to the side by an extension-piece or brought farther in toward the center by a stopping-off piece on the pattern, the levers C and C' will then be adaptable for narrower or wider machines. The limb L' of minor lever C' can in the same manner be made shorter or longer by a stopping-off or an extension piece for the pattern to meet the position of C⁵ on limb L of major lever C. The limb L⁵ of minor lever C' is also made hollow or channeled at C⁹ to make room for the coupling-link C⁶, Fig. 6, and a muff, C⁸, is fitted on and provided within on the top side with a knife-edge, e^8, and set in the desired position and secured by the set

screw C'. The adjustment of the levers C and C' at the couplings C² and C², Fig. 4, becomes very easy, as their position is on the outside of the platform A, and they can be got at through the hand hole B¹⁰, Fig. 2, of the box-neck B' without disturbing any parts of the weighing-machine. The position of these coupling-centers c^2 and c^2, Figs. 4 and 6, are of course equally distant from the fulcrum-centers c^1 of the levers C and C'. The distance between the two coupling-centers c^2 c^2, as shown in Figs. 6 and 7, is by this arrangement brought down to a minimum, which is very important in the coupling of a pair of levers to insure sensitive weighing. The form of these levers is of advantage on account of leaving the center space of the machine unorchpied and allowing the beams which carry the platform with the load to come down in between them, and also in larger machines they allow a free access down into the pit of the machine foundations and the whole can be got into a shallow box.

The lever C is carried by its fulcrum knife-edges c^1 in the links c^1, Figs. 2, 8, and 9, hanging in the corner-box brackets B' of the machine box, and suspended in the shackle G', Figs. 10 and 16, by the knife-edge in muff C¹¹, Figs. 10, 2, and 3, which is adjustable and secured by set-screws C¹², Fig. 4, and hooked onto the suspension-rod G', Figs. 10 and 16, in the relieving apparatus. The minor lever C', Fig. 3, is suspended by the knife-edge c^1, Fig. 6, in muff C³ from the coupling-link C', that is again carried by the knife-edge c^1 in muff C⁴ on the short arm C³ on the diagonal arm L, Fig. 3, of major lever C. The link c^3, Figs. 8 and 9, in one corner-bracket is connected by a rod, c^4, to the link c^3 in the opposite corner-bracket of the machine-box. The connection of the links c^3 by the rod c^4 prevents the levers C and C' from moving in a direction opposite to each other, but still allows a simultaneous parallel action to take place by any side motion of the platform A.

The platform A, Figs. 8 and 9, with beams B and B' and cross-beams B' at each end of machine, will rest at the points B' of the four corner-brackets B' when the machine is thrown out of gear, as shown in Fig. 8. The platform A is made of wood, and the central planks, P', Figs. 8 and 9, are secured to the wooden beams B' and placed on the main wooden beams B. The two outside planks, P, are secured to the cross-beams B' at the overhanging parts B', Fig. 8. The three sides B', Figs. 1 and 9, of the machine-box can also be made of wood and dovetailed into the corner-brackets B', and plates B' are let in on the outside and secured with bolts through the brackets B'. The neck B' of machine-box is of metal and bolted to the corner-brackets B', Figs. 11 and 12, and to the casing of the relieving apparatus at B¹¹. By this mode of making the box a great deal of metal is saved. The suspension-rod G', Figs. 10 and 13, in the indicating apparatus is hooked into the shackle G', the latter carrying the suspension knife-edge C¹¹, Figs. 3 and 4, in the muff on the major lever's limb L. The suspension-rod G' has at its upper end two lateral projecting shoulders, r, and the shackle g. This latter is hooked up by the hook r', hanging by the bolt in the eye of shackle-guard g', which in turn hangs on the shackle g^2, suspended from the knife-edge k on the arm k^2 of the compound lever H of the indicating apparatus, Fig. 10, where all the transferred power from the levers C and C' is taken up by these means.

The indicating apparatus in Figs. 10, 11, and 12 is drawn in its half-way position. The indicating apparatus consists of the compound lever H, supported on the knife-edges k^1, working on frame F, carrying a sliding weight, I, on the arm k^2, having a scale for adjusting said weight and a clamping-screw, i. This weight I is used for weighing off the tare. On the said arm k^2, at the extreme end, is suspended from the knife-edge k^2 the shackle g^1 and suspension-rod g^1, with piston K in plunger J, filled with any suitable liquid and covered with the box-cover J'.

The piston K is made up of a number of plates, r, a little apart from each other to allow the liquid to form a hydraulic packing. The cover J' has a hole in its top and bottom large enough for the suspension-rod g^1 to pass through, plus clearance, and is made in the form of a box, that the fluid in the cover may act like a cushion for the fluid that tries to rush up through the bottom hole, and also for the purpose of hindering motion of the liquid in the plunger-box J by the working of the piston K. The other arm, k^1, on the opposite side of the knife-edges k^1, has a counter-balance-weight, I', by which the indicating apparatus is brought to zero, and is also provided with a knife-edge, k^1, fixed at the same distance from k^1 that k^2 is. From knife-edge k^1 is suspended the shackle g^2 and suspension-rod g^2, with piston K' in plunger-box J'. This latter is filled with fluid (petroleum or other oil preferred) and covered with the box-cover J', and is in every respect like its fellow plunger box, J. Piston K' in plunge-box J' checks undue oscillation of the compound lever H in its upward movement, and the piston K in plunger-box J acts in a similar manner for the downward movement.

The arms k^1 and k^2 constitute the equal beam of the compound lever H.

To insure the same level of the fluid in the two plunger-boxes J and J', they are provided with a tube, T, which is provided with a cock, T', fixed on the side near to the bottom of the two plungers. Thus, when the fluid is poured into one plunger the cock T' is opened, and the liquid will find its own level through the tube T. The communication is then closed, if desired, by turning the cock T'.

When the plunger-boxes J and J' are to be emptied, the cocks T' and T', Figs. 10, 11, and 12, are opened and the fluid runs out. The liquid in the plunger-boxes may be at a

high or low level without having any interfering effect upon the counterpoise-weight W. The arm h^4, going in a downward direction, is at the extreme end provided with a knife-edge, h', from which is suspended in the shackle g' the counterpoise-weight W. This arm h^4 constitutes the pendulous lever or pendulum. The arm h^3, going in an upward direction and bolted to and forming a part of the compound lever H, carries the dial D, on which are a series of scales, d, for the minor weights, and a scale, d', on the edge of the dial for the major weights. The indication on the dial takes place in the following manner: On the arm h^3 is bolted a segment-quadrant, M', on which is fastened by its one end a chain, M, that passes round a helical grooved pulley, O', working in a bracket, S, fixed on the carrier-frame F', bolted on the base frame F^3. The chain M is fastened on the middle of the pulley O' to prevent its slipping, and a weight, Q, at the other end keeps the chain tight. On the inner pivot of the pulley O' is fixed a pointer-wheel, O, that points to the scales d for the minor weights on dial D, and a pointer, O', that is fixed on the casing points to the scale d' for the major weights on the edge of dial D.

To bring the machine out and into gear, I make use of the relieving apparatus, as shown to a larger scale in Figs. 13, 14, 15, 16, and 17. A hand-lever, R, Figs. 1, 2, 10, 11, 12, 13, 14, and 15, is fixed on the one end of spindle R^2, working in the bearing R^3, bolted on the frame F, and on the other end is fixed a radial grooved disk, R^1. The disk R^1 works the disk R^2, provided with three pins with friction-rollers r^2, equally distant from each other, working in the grooves r^3 of disk R^1. The disk R^2 is fixed on the end of spindle G^1, working in the bearings G^4, bolted down on the frame F, and has also fixed on the same spindle, in between the bearings G^4, a pinion, G^5, working into rack G^6, guided in the guides G^7, which are in one with the bearings G^4. In one with the rack G^6 is a bracket, G^8, for the purpose of taking the suspension-rod G^3 at the forked part r of the same. If the hand lever R be lifted up—say as much as an angle of forty degrees—the grooved disk R^1, turning disk R^2 by the pins with friction rollers r^2 to double the amount—that is, to eighty degrees—and having the pinion G^5 on the same spindle, G^1, it lifts the rack G^6, with bracket G^8, till it lifts out the shackle g at the fork part r of the suspension-rod G^3 (that carries the levers, &c., in the weighing machine) from the hook r', and, as the shackle g is made with a curvature to the one side at the upper part, it is heavier on that side, and will therefore fall back onto the guard-shackle g'. The hook r', that is balanced by the ball r^3, will fall a little to the side, as shown in Fig. 16. As the shackle g is unhooked from r', the compound lever H, Fig. 10, will then be resting by its arm h' in the carrier-frame F at f. By reversing the action of the hand-lever R, Figs. 13 to 17, the rack G^6, with the suspension-rod G^3, resting in the bracket G^8, will then be brought down, and the shackle g will be guided forward and down on guard g', as shown dotted in Fig. 16, but cannot fall forward more than the projecting parts f' on the shackle g will allow, as these will rest on the fork part r of the rod G^3. The rod G^3 with the levers will be brought down till the beams B^2 in the weighing-machine come down upon the parts B^3 of the bracket B^1.

To put the apparatus into gear, I repeat the operation and lift the hand-lever R on spindle R^2, carrying the grooved disk R^1, that rotates the disk R^2 on the spindle G^1, and with it the pinion G^5. This latter works the rack G^6, thus raising or lifting the same with the suspension rod G^3 in the bracket G^8 till the shackle g comes up against the hook r'. This being nicely balanced by the ball r^3, will be easily pushed upward and aside till the shackle g has passed the hook r'. Then the hook r' will fall back again, and thus cause the shackle g to catch the hook r'. The hand-lever R, that works the rack G^6, is now again brought down to its original position, as represented in Figs. 13 and 10.

The machine is now connected with the indicating apparatus, the cart is brought onto the platform A, and its weight found by moving the tare-weight I, Fig. 10, on the arm h^4. When the tare is ascertained, the weight I is fixed in its position by the set screw i. The cart now returns loaded onto the platform A, and causes the compound lever H to move slowly. The dial D on arm h^3 consequently passes from right to left, and at the same time the pointer-wheel O turns round, being worked by the chain M round the helical grooved pulley O'. The major weight is now read off on the scale d' at the pointer O', and the minor weight on the scales d by means of the pointers of the pointer-wheel O.

I claim as my invention—

1. In a weighing-machine, the combination, substantially such as described, of metal corner-box brackets B^3, with the wooden dovetailed sides B^4, and plates B^5, let into the said brackets and secured with bolts to the same, substantially as shown, whereby a considerable amount of metal is saved.

2. In a weighing-machine substantially such as shown, the combination, with the levers C C', of the platform resting thereon, the links e^3, in which said levers rest, and a rod, e^4, connecting said links.

3. In a weighing machine, the combination of a diagonal lever, C, having its respective arm L_1 provided with a hollow arm, C^4, capable on the pattern of being placed at any point on the said arm L_1 and fitted with a muff, C^5, a knife edge, E^3, fitted within on the bottom side of the said muff and fixed to the said arm C^5 by an adjusting device, C^6, at any desired position, whereby machines of different lengths can be supplied with levers to suit them, all cast from the same patterns.

4. In a weighing-machine substantially such as shown, the combination, with the arm L_1 of

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the arms L' and L^2, (the latter being placed centrally on the hanger-shaped ends G,) knife-edges c' and c^2, located on opposite sides of the arm L^2, and stays L^3, L^4, and L^5, connecting the arms L' and L^2, substantially as shown.

5. In a weighing machine, the combination of a minor lever, C', having its arm L^2 capable of being made shorter or longer to suit different lengths of machines, and provided with a hollow extension, C^2, and a muff, C^3, having a knife-edge, c^3, fitted within on the top side of the said muff, and an adjusting device, C^4, whereby the muff C^3 can be fixed in any desired position to adapt itself to the adjustment of the levers.

6. In combination with the major lever C, comprising arms L' and L^2 and braces L^3 L^4 L^5, the minor lever C', comprising similar arms, L^7 L^8, and similar braces, L^9 L^{10} L^{11}, the parts of the minor lever corresponding but opposite in arrangement to the parts of the major lever.

7. The combination, with the platform of a weighing-machine, of an indicator-lever having arms h^2 h^3, the knife-edges h' and h^4, and the pistons K and K', formed of a number of plates a little apart from each other, suspended from the knife edges and working in the plunger-boxes J and J', filled with liquid, whereby the liquid forms a sort of hydraulic packing and a slow and steady motion is insured, substantially as and for the purposes described.

8. In a weighing machine, the combination, with the platform and the dash-pots, of the lever H, provided with an indicator-plate and with dash-pot arms h^5 h^6, a pointer adapted for use in connection with the indicator-plate, an indicator-wheel, and weights I and I', applied to the arms h^5 h^6, all substantially as shown, whereby the arms h^5 h^6 may be used to take the tare instead of having an independent arm therefor.

9. The combination, with the lever H, having laterally-extending arms h^5 and h^6 and vertical arm h^7, of a dial, D, secured to arm h^6 and provided with indicator-scales d' and d, and indicator O, placed to one side of the dial-plate, whereby the main weights can be read off on a scale placed centrally and horizontally, and the smaller weights on another scale placed centrally and vertically.

10. In a weighing-machine, substantially as described, the combination, with the platform and the lever H and its indicator, of the pistons K K', carried by the lever H, and the plunger-boxes J and J', having box-formed covers J' and J', provided with holes to allow the piston-rods to pass through, whereby the liquid in the plunger-boxes is steadied and cushioned when the movements of the different parts of the indicator take place, thereby avoiding jars and concussions.

11. In a weighing-machine, the combination, with the platform and the lever H, connected therewith and provided with pistons K K', of the plunger-boxes J J', and a pipe, T, connecting the boxes and provided with a valve.

12. In combination with the suspension-rod G^3 of a weighing-machine, a shaft, R', provided with a handle, R, and cam-wheel R^2, a shaft, G^5, provided with a pinion, G^4, and with a wheel, R^3, to be actuated by the wheel R^2, and a rack, G^6, adapted to be engaged by wheel G^4, and provided with a bracket, G^7, to engage the rod G^3.

13. In combination with the suspension rod G^3 of a weighing-machine, a projection or shoulder, r, formed thereon, and an adjustable bracket, G^7, adapted to engage said shoulder and to receive the weight of the platform.

14. In combination with the suspension-rod G^3 of a weighing-machine, a shackle, g, a book, r', adapted to engage the hook, a projection, r, upon the rod G^3, a guard, g', and a bracket or stop, G^7, adapted to engage the projection r.

15. In combination with the suspension rod G^3 of a weighing-machine, a bracket, G^8, adapted to engage the same, shackle g, provided with foot f^2, guard-link g', and a pivoted balance-hook, r', adapted to engage the shackle g.

16. In combination with the lever arm h^5 and the rod G^3, a knife-edge, h, upon the lever-arm, a shackle, g^2, suspended therefrom, guard-link g', carried by the shackle g^2, balanced pivoted hook r', and a shackle, g, carried by the arm G^8.

In testimony whereof I have signed my name to this specification in the presence of two subscribing witnesses.

EUGEN WÖLNER.

Witnesses:
WM. P. THOMPSON,
H. P. SHOOBRIDGE.

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(No Model.)

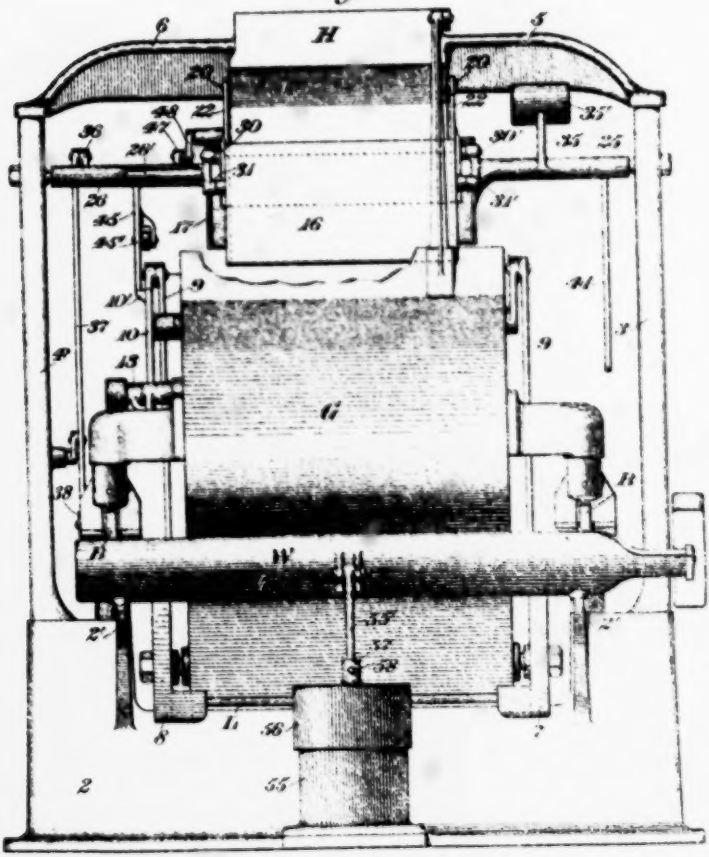
4 Sheets—Sheet 1.

F. H. RICHARDS.

AUTOMATIC WEIGHING MACHINE.

No. 585,979. Patented July 6, 1897.

Fig. 1.



Witnesses:
C. W. Smith
Fred. J. Dole

Inventor,
F. H. Richards

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(No Model.) 4 Sheets—Sheet 2.

F. H. RICHARDS.

AUTOMATIC WEIGHING MACHINE.

No. 585,979. Patented July 6, 1897.

Fig. 2.

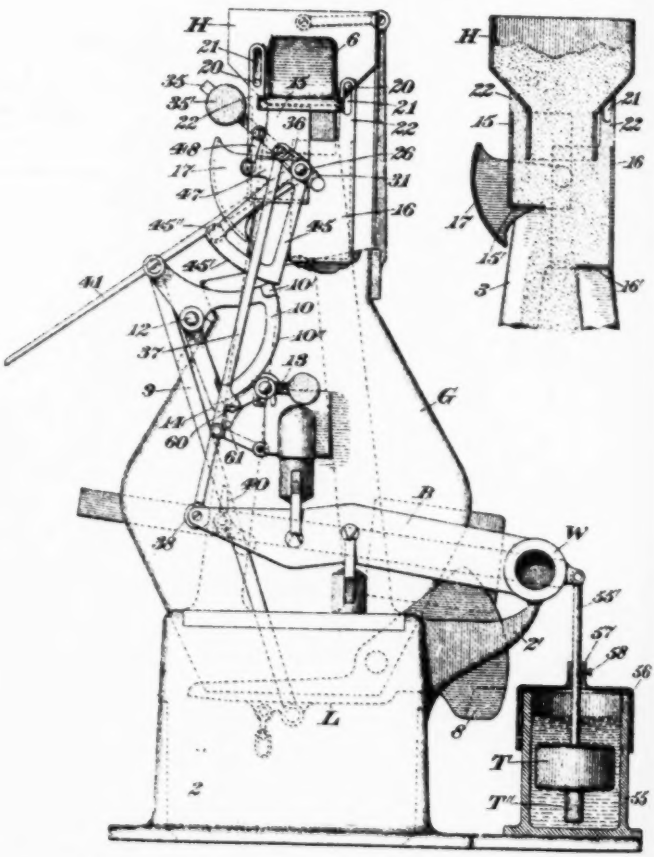

Fig. 5.

Witnesses;
C. Ellis Smith
Fred. J. Dole

Inventor
F. H. Richards.

(No Model.) 1740 4 Sheets—Sheet 3.

F. H. RICHARDS.

AUTOMATIC WEIGHING MACHINE.

No. 585,979. Patented July 6, 1897.

Fig. 3.

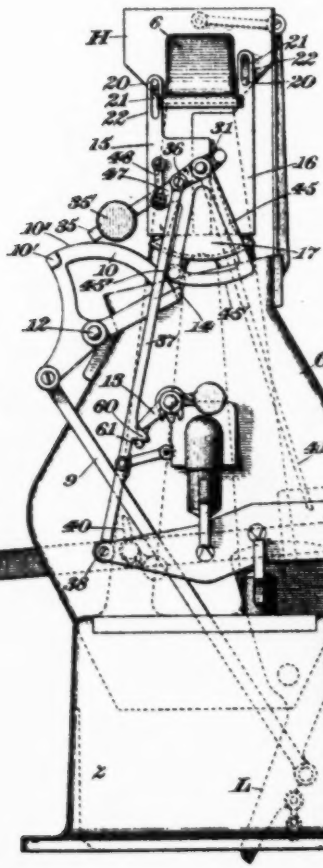

Fig. 6.

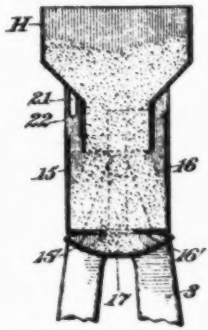

Fig. 4.

Witnesses;
C. W. Smith
Fred. J. Dole.

Inventor;
F. H. Richards.

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(No Model.) 4 Sheets—Sheet 4.

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F. H. RICHARDS.

AUTOMATIC WEIGHING MACHINE.

No. 585,979. Patented July 6, 1897.

Fig. 7.

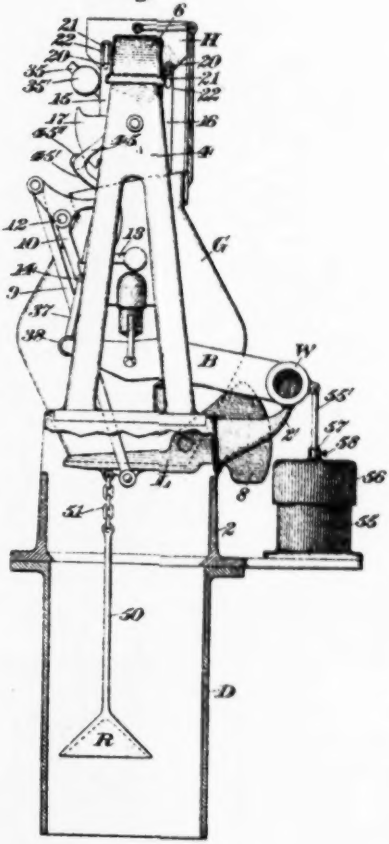
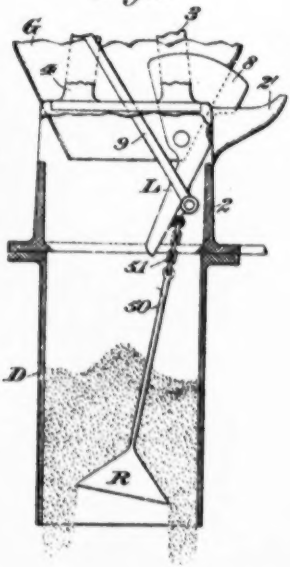


Fig. 8.



Witnesses;
Alf. Smith
Fred. J. Dole.

Inventor;
F. H. Richards.

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UNITED STATES PATENT OFFICE.

FRANCIS H. RICHARDS, OF HARTFORD, CONNECTICUT.

AUTOMATIC WEIGHING-MACHINE.

SPECIFICATION forming part of Letters Patent No. 585,979, dated July 6, 1897.

Application filed December 10, 1896. Serial No. 615,199. (No model.)

To all whom it may concern:

Be it known that I, FRANCIS H. RICHARDS, a citizen of the United States, residing at Hartford, in the county of Hartford and State of Connecticut, have invented certain new and useful Improvements in Automatic Weighing-Machines, of which the following is a specification.

This invention relates to weighing-machines for automatically weighing and delivering various kinds of granular and other free-flowing materials.

With respect to one of its features the invention comprehends the provision of means for applying to the weighing mechanism a variable amount of resistance.

In the form thereof illustrated I apply to the weighing mechanism, toward the initial stage of the loading period, a progressively-increasing resistance, which culminates at the commencement of the poising period, at which time the resistance is preferably increased comparatively suddenly, so that the load-receiver or bucket cannot descend below the so-called "poising-line" prematurely and with an underload.

Another object of the invention is to provide improved stream-controlling means embodying a plurality of stream-controlling devices for obtaining a more efficient reduction of the supply-stream at proper points in the operation of the machine and to cut off the same, such stream-controlling members being also operative to insure the free passage of the supply-stream toward the load-receiver when the bucket is in its stream-receiving position.

Another object of the invention is to provide means in conjunction with the shiftable load-discharge member of the weighing mechanism, which in the present case is the closer, for preventing the return movement of said load-discharge member on the discharge of the load and until the latter is fully emptied from the bucket.

In the drawings accompanying and forming part of this specification, Figure 1 is a front elevation of a weighing-machine embodying my present improvements, and it illustrates the positions occupied by the respective parts at the commencement of operation. Fig. 2 is an end elevation as seen from the left in Fig. 1, the parts being in positions corresponding therewith. Fig. 3 is a view similar to Fig. 2, and it illustrates the supply to the bucket having been stopped and the closer of said bucket open to discharge the load. Fig. 4 is a detail view of the means employed for holding the stream-controlling mechanism at the drip position. Figs. 5 and 6 are detail views, in longitudinal central vertical section, of the valve mechanism, showing the same in its two extreme positions. Fig. 7 is an end elevation of the weighing-machine, and it also illustrates the regulator in operative connection with the closer; and Fig. 8 is a detail view of the lower part of the machine, showing such regulator in its working position and also illustrating as lodged thereon the load discharged from the bucket.

Similar characters designate like parts in all the figures of the drawings.

The framework for supporting the various sets of mechanisms may be of any suitable structure, and in the form illustrated it comprises the chambered base 2, the end frames 3 and 4, which rise therefrom, and the brackets 5 and 6, which extend oppositely from the hopper or chute, said parts being connected to each other in a suitable manner and the hopper constituting a convenient means for delivering the supply of material toward the load-receiver.

The weighing mechanism is made up of a load-receiver and a counterweighted scale-beam therefor, such load-receiver in the present case being designated by G and consisting of a bucket of the well-known single-chambered vertically-reciprocatory type.

The scale-beam is designated by B, and it will preferably be mounted upon the base 2, as usual, and will have supports near its poising side for sustaining the load-receiver or bucket G. The beam B consists of a pair of longitudinal parallel arms joined at the rear by the combined counterweight and connecting-shaft W.

The bucket G will have the usual discharge-outlet from which the loads of material are intermittingly discharged into the discharge-conduit D, (see Figs. 7 and 8,) first having

passed through the chambered supporting-base 2, said discharge-conduit being bolted or otherwise secured to said base.

For controlling the discharge-outlet of the bucket I provide a closer which is designated by L. The closer proper consists of a flat plate which fits against the lower edge of the bucket when it is shut and is pivotally connected to the bucket G at one side the discharge-outlet thereof. The closer will be also counterweighted, as at 7 and 8, the purpose of the counterweights being to return said closer to its shut position when the load has been discharged from the bucket.

The closer-holding means include a latch and a toggle, which latter is preferably of the inverted type, said toggle consisting of the relatively long rod 9 and the rocker 10, which is carried by the rock-shaft 12 on the bucket G, the rod 9 being pivotally connected to the rocker 10 and also to the closer L in such a manner that the several toggle-pivots will be approximately in line when the closer is shut. The latch is designated by 13, and it is preferably counterweighted and pivotally mounted upon a suitably-positioned bracket carried on the end wall of the bucket. In the form shown the latch swings upward to engage the cooperative arm 14 of the rocker, as indicated in Fig. 2, it being evident that the latch is disengaged from the rocker 10 by a downward pressure thereon, so that when this operation takes place the closer L will be freed of all restraint and can be forced open by the weight of the load resting thereon within the bucket.

In conjunction with the stream-supplying means I employ a series of stream-controlling members, a pair of which are designated by 15 and 16, respectively, (see Figs. 5 and 6,) the third member being designated by 17 and being an oscillatory valve or cut-off adapted to arrest the supply-stream, which is diminished by the joint action of the two stream-reducers 15 and 16.

The stream-reducers 15 and 16 are preferably carried by the hopper H for reciprocatory movement—in the present instance in a vertical plane—they being also movable in parallelism.

The stream-reducer 15 has the inwardly-projecting flange 15', while the complemental member has a similar flange 16', which together constitute a means for diminishing the volume of the supply-stream, which flows from the hopper H as said flanges are moved toward each other, the distance between their discharge edges gradually decreasing during the loading period, said flanges when the load is finished being opposite each other, or in alinement, as represented in Fig. 6, the supply-stream then being an attenuated one, whereby the valve 17, by being projected across the path of such attenuated stream, may cut off the same and prevent its passage to the loaded bucket. The opposite end walls of the hopper H, near the front and rear sides thereof, will be furnished, respectively, with projecting pins or studs 20, about which extend the walls of the longitudinal slots 21 in the four arms 22 of the two stream-reducers 15 and 16 at opposite sides thereof. The walls of the stream-reducer 15 will also preferably overlap those of its mate 16, as indicated in the several end elevations, whereby a lateral escape of the material as it flows toward the bucket is prevented.

The valve 17, which is oscillatory, is supported between the end frames 3 and 4, it being carried by a two-part shaft the respective sections of which are designated by 25 and 26, said shaft-sections having bearings in the outer extremities thereof for receiving journals or pivot-screws on the two end frames 3 and 4.

For obtaining the necessary operation of the two stream-reducers 15 and 16 I prefer to operatively connect them with the valve. The left-hand end wall of the valve (see Fig. 1) is furnished with two rock-arms 30 and 31, oppositely disposed, and which are pivoted, respectively, to the two stream-reducers 15 and 16, the opposite end wall of the valve being furnished with a similar pair of rock-arms 30' and 31', likewise jointed to the two stream-reducers.

It will be evident that as the valve swings from its wide-open position, as represented in Fig. 5, to its shut position, as shown in Fig. 6, to cut off the supply the arms 31 and 31', and consequently the stream-reducer 16, will be elevated, the stream-reducer 15, through the medium of the arms 30 and 30', being lowered, whereby the flanges 15' and 16' will be moved toward each other as the valve closes to progressively reduce the volume of the supply-stream which flows toward the bucket, the stream being subsequently wholly cut off by the valve 17 when it crosses the path of the reduced supply-stream or drip during the second stage of its closing movement or when it is released at the conclusion of the drip-supply period, as will hereinafter appear.

For actuating the valve 17 to close the same and for also operating the two stream-reducers 15 and 16 to obtain the necessary reduction in the volume of the supply-stream I provide the rearwardly-extending counterweighted arm 35, carried by the shaft-section 25, its weight being designated by 35', and said counterweighted arm or valve-closing actuator will exert a constant valve-closing action as it drops from its normal position in Fig. 2, which, however, is controlled or limited by the weighing mechanism, and the means for obtaining this last-mentioned result will now be set forth. The shaft-section 26 is furnished with a rearwardly-extending short crank-arm 36, to which is pivoted the connecting-rod 37, the free end of the latter bearing against a projection or antifriction-roll 38 on an arm of the beam B, said rod being also connected to the framework of the machine by a suitable

guide-link, and it will be evident that as the beam descends during the loading period the closure of the valve, and consequently the operation of the two stream-reducers 15 and 16, will be obtained by the dropping of the counterweighted arm or valve-closing actuator 35, the action of said arm being in correspondence with the movement of the weighing mechanism.

The scale-beam B constitutes a convenient and suitable valve-opening actuator, it being adapted, as it rises from its lowermost position, as shown in Fig. 3, to that indicated in Fig. 2, to transmit an upward thrust to the rod 37, which is communicated to the operatively-connected valve 17, it forcing the same open and simultaneously moving the two stream-reducers 15 and 16 away from each other, and on such action of the latter they act as agitating devices for loosening up the mass of the material between the hopper and flanges 15' and 16', respectively, sufficiently to insure the free passage of the material to the load-receiver or bucket G.

Means are provided for intercepting the closing movement of the valve when the major part of the load has been supplied to the bucket, a stop carried by the weighing mechanism being preferably employed for this purpose, such a stop being represented at 40 and being of the "by-pass" type and being disposed in the path of movement of the depending rod 41, which is rigidly connected to the valve-shaft section 25, so that at the commencement of the poising period said by-pass, which is on an arm of the beam B, will engage the rod 41 (see Fig. 4) and will thereby hold the valve temporarily against further closing movement, the discharge edge of the valve at this time being substantially in vertical alinement with the discharge edge of the flange 15'.

The two flanges 15' and 16' at this point will be quite close to each other and will have materially reduced the volume of the supply, said supply being in the form of a drip. This reduced stream will flow into the bucket for a relatively brief period of time to complete the partial load therein, and when the load has been completed the beam and bucket will be carried below the so-called "poising-line," the by-pass 40 moving therewith and descending below the drip-rod 41 will release said rod, and consequently the valve, whereby the latter will be given its final closing movement by the falling of the counterweighted arm 35 to cut off the reduced stream, which flows between the discharge edges of the flanges 15' and 16'.

In connection with the stream-controlling mechanism and with the shiftable load-discharge member of the weighing mechanism I provide reciprocally-effective stops, the one operative with the stream-controlling mechanism being designated by 45, while the rocker 10 constitutes its companion, said stops being both of open segmental shape and the stop 45 being preferably formed integral with the longitudinal sleeve or collar, which is loose on the reduced portion 26' on the shaft-section 26. (See Fig. 1.)

The function of the stop 10 is to limit or prevent the passage of material to the bucket or load-receiver during the discharge of a load, and hence limiting the action of the stream-reducers 15 and 16 and the valve 17, with which the coacting stop 45 is operative, and the office of the latter is to limit the opening of the closer while any part of the supply is being delivered to the bucket. The longitudinal sleeve or collar 26 is furnished with a lug 47, to which is pivoted the short link 48, said link being likewise connected to the stream-reducers. (See Figs. 1, 2, and 3.) The operation of these coacting stops will be understood from an inspection of Figs. 2 and 3 of the drawings.

In Fig. 2 the valve 17 and the two stream-reducers 15 and 16 are represented as being in their wide-open positions, so that a stream of relatively large volume can pass between the two discharge edges of the flanges 15' and 16' and enter the bucket G.

The auxiliary stop or boss 10' on the stop 10 is contiguous to the curved face 45' of the stop 45, which is connected to the valve mechanism, so that should the latch 13 be tripped too soon the oscillation of the stop 10 will be positively prevented by its mate 45, the closer L being thereby held shut.

As the valve 17 is closed the stream-reducers 15 and 16 will be moved toward each other by reason of the connections thereof with the valve, so that the stop 45 will be moved in unison therewith by reason of the link 48, which is connected to the stream-reducer 15 and which is forced downward with the stream-reducer, which action will swing the stop member 45 bodily to the right.

When the stream or supply has been fully cut off, the stop member 45 will have crossed the plane of the curved stop-face 10'' of the stop 10, so that the latter, provided the latch 13 has been tripped, can rock about its center by the opening of the closer, and in so doing said curved stop-face will run in contact with the roll or auxiliary stop 45'', whereby retractive movement of the stop 45, and hence the various stream-controlling members 15, 16, and 17, will be prevented and until the stop 10 has been returned to its normal position by the shutting of the closer, when said stop 10 will release its mate 45, as will be clearly evident.

In connection with the closer L, I provide a regulating device (see Figs. 7 and 8) which may be located for operation within the discharge-conduit D, said regulator being designated by R and being preferably conical to permit the free gravitation of the material from its face. Said regulator R, which is operatively connected with the closer L, is disposed at some distance below the closer and is intended to receive the load discharged

from the bucket, whereby the pressure of the load of material acting against said regulator will be sufficient to hold the closer open to permit the complete emptying of the bucket.

The regulator R, which is freely movable in the discharge-conduit D, is furnished with a relatively long stem 50, which extends from its apex and which is preferably connected to the closer by flexible means, such as the chain 51.

On the opening of the closer the load will be discharged against the regulator and its weight will be sufficient to maintain the closer open for a relatively long period of time and amply sufficient to permit the clearance of the bucket, which is a particularly advantageous point when the machine is weighing such materials as wet coal. When the weights 7 and 8 overcome the amount of force applied to the regulator R by the material, they will promptly shut the closer, and as this action takes place all parts of the material will gravitate from the regulator, which is also given a jar by the shutting of the closer, to facilitate the removal of particles of material therefrom.

In conjunction with the beam R, I provide a resistance member, which is in the form of a weight T, immersable in a fluid-containing receptacle 55, said weight having a longitudinal rod 55', which is pivoted at its upper end between ears on the face of the beam-weight W. (See Figs. 1, 2, and 3.)

When the beam-weight W is upon the support 2, which extends from the base 2, the weight T, which acts as a supplemental counterpoise member, will be wholly immersed in a fluid within the receptacle 55, the result being a considerable loss in efficiency of said weight. As the poising side of the beam descends, it being that part of the beam to the left of its axis, the weight W of course will be caused to rise, whereby the supplemental counterpoise-weight or resistance member T will be slowly removed from the fluid, and will thereby gradually increase in efficiency, so that there is applied to the bucket a progressively-increasing resistance for preventing its rapid descent, which is very important at the commencement of the poising period when the weight T is wholly removed from the fluid in the receptacle 55, as indicated by the dotted lines in Fig. 3, at which time its full effect is applied to the poising side of the weighing mechanism, and in effect to the bucket, so that it cannot be carried prematurely below the so-called "poising-line" with an underload.

For preventing the application of the resistance too suddenly to the bucket or load-receiver G, I provide a second and much smaller weight T', which extends centrally from the larger weight T, and which remains partially immersed in the fluid when the weight T has been removed therefrom.

To prevent entrance of dust or dirt to the interior of the fluid-containing receptacle 55, I provide a cover or cap 56, which has on its upper face a projecting collar 57 and which embraces the rod and through which may be passed a binding-screw 58 to hold the cap or collar in position, and said screw may be loosened to raise the cap to introduce a fluid into the receptacle 55, it also forming a means of locking the cap 56 to the rod 55'.

It will be understood that the fluid within the receptacle 55 constitutes a means for varying the efficiency of the counterpoise-weight T as the latter reciprocates, and that at the commencement of the poising period said weight will have practically attained its highest efficiency, so that the bucket can be brought to a true poise by the drip-stream with great nicety and to avoid its being carried too quickly below the poising-line.

For tripping the latch 13, to which I have hereinbefore referred, I provide a latch-tripper 60, which is in the form of a rigid projection on the thrust-rod 37 and which has a movement into engagement with the laterally-projecting pin 61 on said latch at the close of the weighing operation to depress the latch and disengage it from the coöperative arm 14 of the rocker 10.

The operation of the hereinbefore-described machine, briefly, is as follows: Fig. 2 represents the positions occupied by the several parts at the commencement of operation, the two stream-reducers 15 and 16 and the valve 17 being in their wide-open positions and the closer L being shut and held in such position by the latch 13, which is in engagement with the arm 14 of the rocker 10. This being the case, a stream of material of relatively large volume will flow from the hopper H and gravitate into the bucket G. When a certain proportion of the load has been received by the bucket, it and the poising side of the scale-beam B will descend, so that as said beam falls away from the rod 37 the closure of the valve 17 may be effected by the dropping of the counterweighted valve-operating arm 35. As said valve thus closes the two stream-reducers 15 and 16 will be moved toward each other for progressively diminishing the volume of the supply-stream, which latter is of very small volume at the commencement of the drip period. At the commencement of the drip period the by-pass 40 on the beam B will be engaged by the coacting rod 41 on the valve-shaft section 25, as represented by Fig. 4, to hold the valve 17, and consequently the two stream-reducers 15 and 16. When the drip-stream completes the load, the beam B will be caused to pass below the poising-line, carrying the stop 40 therewith and below the plane of oscillation of the rod 41, thereby releasing the valve 17, so that it may promptly shut and the two stream-reducers 15 and 16 be moved toward each other. On the final closing movement of the valve the tripper 60, which is connected thereto, will be forced downward and impinging against the laterally-extending pin 61 on the latch 13

will depress said latch and disengage it from the coöperating arm 14 on the rocker 10, thereby freeing the closer L of all restraint, so that it can be instantly forced open by the weight of the contents within the bucket G. On the complete discharge of the bucket-load the closer will be shut by its counterweights 7 and 8, and the several operative parts of the machine will be then returned to their primary positions.

Having described my invention, I claim—

1. The combination of a supply-hopper; a vertically-reciprocatory stream-reducer; and a cut-off valve for said hopper, supported for movement independently of and connected with said stream-reducer.

2. The combination, with a load-receiver, of stream-supplying means therefor; a pair of stream-reducers each consisting of a plate supported for vertical movement and having at its end a flange; and means for simultaneously reciprocating said plates in opposite directions, to thereby move the flanges toward and from each other.

3. The combination, with a load-receiver, of a supply-hopper; a plurality of vertically-reciprocatory stream-reducers on said hopper; and means for moving said stream-reducers toward and from one another.

4. The combination, with a load-receiver, of a supply-hopper; a plurality of stream-reducers supported for parallel reciprocatory movement; and means for moving said stream-reducers toward and from each other.

5. The combination, with a load-receiver, of stream-supplying means therefor; a vertically-reciprocatory stream-reducer; a cut-off; and a connection between said cut-off and the stream-reducer.

6. The combination, with a hopper; of a plurality of reciprocatory members operative in conjunction with said hopper and each having a flange, said flanges being movable toward and from each other; a valve; and actuating means for said reciprocatory members and valve.

7. The combination, with a load-receiver, of stream-supplying means therefor; a vertically-reciprocatory stream-reducer; a valve having an arm connected to said stream-reducer; and valve-actuating means.

8. The combination, with a load-receiver, of stream-supplying means therefor; a series of reciprocatory stream-reducers; a valve having oppositely-disposed arms connected, respectively, to said stream-reducers; and valve-actuating means.

9. The combination, with a hopper having a series of pins projecting therefrom; of a plurality of stream-reducers longitudinally slotted, the slots of which embrace said pins; and means for oppositely reciprocating said stream-reducers.

10. The combination, with weighing mechanism including a shiftable load-discharge member having a stop, of stream-supplying means; a vertically-reciprocatory stream-reducer provided with a stop coöperative with the first-mentioned stop; and a valve.

11. The combination, with weighing mechanism including a shiftable load-discharge member having a stop, of stream-supplying means; a reciprocatory stream-reducer; a valve and its shaft; and a stop sleeved on said shaft and connected to the stream-reducer and coöperative with the first-mentioned stop.

12. The combination, with weighing mechanism including a shiftable load-discharge member having a stop, of stream-supplying means; a vertically-reciprocatory stream-reducer; a valve and its shaft; and a longitudinal sleeve on said shaft, connected to said stream-reducer and having a stop coöperative with the first-mentioned stop.

13. The combination, with weighing mechanism including a bucket having a closer, of means comprehending a latch for normally holding said closer against movement; a stop operative with said closer; stream-supplying means; a vertically-reciprocatory stream-reducer; a valve and its shaft having a stop coöperative with the first-mentioned stop and connected to the stream-reducer; a connection between said stream-reducer and valve; and a latch-tripper connected to the valve-shaft.

14. The combination, with weighing mechanism including a shiftable load-discharge member, of a discharge-conduit located below the weighing mechanism; a regulator disposed in said conduit and adapted to be acted upon by a load of material; and a flexible connector between said regulator and shiftable load-discharge member, whereby the regulator is freely movable in the discharge-conduit.

15. The combination, with weighing mechanism comprehending a bucket having a discharge-outlet; of a closer for said outlet, hinged to the bucket; a discharge-conduit located below the weighing mechanism; a regulator disposed in said conduit and adapted to be acted upon by a load of material; and a flexible connection between said regulator and the closer, whereby the regulator is freely movable in the discharge-conduit.

16. The combination, with a load-receiver having a closer, of a discharge-conduit situated below the load-receiver; a conical regulator disposed in said discharge-conduit and adapted to be acted upon by a load of material emptied from the load-receiver; and a flexible connection between said regulator and the closer, whereby the regulator is freely movable in the discharge-conduit.

17. The combination, with a load-receiver having a closer, of a discharge-conduit situated below said load-receiver; a regulator disposed in said conduit and adapted to be acted upon by a load of material emptied from the load-receiver; a rigid stem on the regulator;

and a flexible connection between the same and the closer, whereby the regulator is freely movable in the discharge-conduit.

18. The combination, with a load-receiver having a closer, of a discharge-conduit situated below the load-receiver; a regulator having a rigid stem; and a chain connected, respectively, to said stem and the closer.

19. The combination, with a load-receiver having a closer, of a discharge-conduit situated below said load-receiver; a conical regulator disposed in the discharge-conduit at a point relatively remote from the closer, said regulator having a rigid stem; and a chain connected, respectively, with said stem and closer.

20. The combination, with weighing mechanism embodying a load-receiver and a supporting scale-beam therefor having a counterbalance-weight adapted to exert a constant force equal to that of the load-receiver and its predetermined charge, of stream-supplying means; a stream-controller; connections between the weighing mechanism and stream-controller, for governing the action of the latter; a fluid-receptacle; and a resistance member consisting of weights of two different sizes immersable in the fluid in said receptacle and connected to one of the members of the weighing mechanism.

FRANCIS H. RICHARDS

Witnesses:
FRED. J. DOLE,
F. N. CHASE.

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UNITED STATES PATENT OFFICE.

ALLEN DE VILBISS, JR., OF TOLEDO, OHIO

SCALE.

SPECIFICATION forming part of Letters Patent No. 621,297, dated March 14, 1899.

Application filed December 13, 1897. Serial No. 661,838. (No model.)

To all whom it may concern:

Be it known that I, ALLEN DE VILBISS, Jr., a citizen of the United States, residing at Toledo, in the county of Lucas and State of Ohio, have invented certain new and useful Improvements in Scales; and I do hereby declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

This invention relates to scales, and more especially to that class thereof employing pendulums; and the object of the same is principally to produce a scale of this character whose hand or index swings in irregular steps as weight is added to the pan or platform over a straight-line table whose graduations or marks are equidistant.

Other objects are also attained, such as the simplicity of construction, the provision of several adjustments, the adaptability of the one scale to heavier or lighter work, and the like.

To this end the invention consists in a construction embodying the features hereinafter described and claimed, whether in the exact or any equivalent form, and as illustrated in the drawings, wherein—

Figure 1 is a side elevation of this improved scale complete, showing it of the "pan" type, although it will be clear that it might be of the "platform" pattern, if desired. Fig. 2 is a similar elevation with the front of the casing removed to show the interior mechanism. Figs. 3 and 4 are plan views, the first with and the second without the pan. Fig. 5 is a vertical section on line G of Fig. 2, and Fig. 6 is an elevation of a modification.

Referring to the drawings by reference-letters, A designates the scale-beam, fulcrumed within the casing or housing in the usual manner, as on a knife-edge B, and C is a second pivot or knife-edge, which in the present instance supports the bail M of the pan R, although it will be clear that by a slight change in structure the well-known platform could be substituted for the pan without departing from the spirit of my invention. Nothing new is claimed for this much of the device.

E is a bracket of any suitable character fast within the housing, and D is the poise, pivoted at D' to this bracket and hanging normally vertical within the housing, although capable of swinging outward through a slot therein, as seen. The poise consists of a pendulum preferably marked with graduations, an adjustable weight J, moving thereover for a purpose to appear below, and an arm N, projecting laterally from the pendulum adjacent but below its pivot D'.

F is a connection of any suitable character between the inner end of the beam A and the outer end of the arm N.

In the modification illustrated in Fig. 6 the weight J' may be non-adjustable, and the arm N' is longitudinally slotted, as seen, so as to receive an adjustable block F', to which the lower end of the connecting-rod F is pivoted. In this case the arm would be provided with the graduations, and the adjustment of the block farther from or nearer to the pivot D' would have substantially the same effect as the adjustment of the weight J of Fig. 2, either form of adjustment causing the poise to have greater or less resisting power, and hence to swing through smaller or larger arcs.

H is a hand or index, of any suitable light material and which is rigidly secured to the poise at its pivotal point D'. It preferably extends slightly below the same and carries a counterweight I, and it rises above the pivot within the housing, as seen. Said housing also carries a scale or table L of any suitable character and preferably protected by glass, and the graduations of this table are equidistant from each other, as seen, while they extend in a perfectly straight horizontal line across the upper part of the housing. In swinging, the index H moves across said graduations in an upward-bowed arc, and hence the graduations are preferably marked on lines radiating from the point D'; but it is essential that they be equidistant from each other, as shown.

All parts of this improved scale are of the desired materials, sizes, and proportions, and such changes in construction may be adopted as come within the spirit of my invention. I do not wish to be limited as to details excepting as set forth above and in order to produce the proper operation of the whole. The ta-

ble is preferably inscribed with rows of graduations indicating pounds (or the like) and fractions thereof, as well as prices, and when the latter are used the weight on the poise can be set at any desired price per pound and the graduations read for the aggregate. However, I reserve the privilege of using any desired marking adjacent all the graduations mentioned herein.

The parts being constructed about as above set forth and standing at rest, as seen in Fig. 2, the placing of one pound on the pan R will cause the tilting of the beam A and through connection F and arm N will swing the poise D to the left one step. Since the index H is attached to the poise and projects above its pivot D', it will therefore be swung to the right one step. The successive addition to the pan of other pounds will similarly move the parts, though in irregular steps, the reason being that as the pendulum D rises the arm N approaches the horizontal line of the pivot D' and gains leverage more rapidly than the pendulum gains weight. After passing said horizontal line the arm N loses power, while the pendulum in its continued rise gains further weight. Hence through the first portion of this operation the length of the steps increases, and through the latter portion it decreases, so that if the table L were curved to conform with the movement of the index H around the center D' its graduations would necessarily be irregularly spaced. I have found by practical experiment, however, that if the graduations at L are arranged in a perfectly straight line which is a chord of the arc through which any given point on the index moves the variable distance between the steps on the arc is just such that the steps on the straight line are uniform, and the graduations if placed adjacent or upon said line will be truly equidistant. If this is true of one straight line, it is true of another so long as it is a chord of said arc, and hence I may use several lines to indicate varying prices and weights. Nor is this rule inoperative if the poise be rendered heavier or lighter, (as by adjusting weight J on pendulum D or block F' in the slot of arm N',) although the steps will thereafter be relatively shorter or longer, and other lines in the table will be used. Hence by means of the adjustment described the range of action of the scale may be increased or diminished.

What is claimed as new is—

1. In a scale, the combination with the beam, the pan carried thereby, the poise, and connections between the beam and poise for causing the swinging of the latter in irregular steps as weight is added to the pan; of an index secured to the poise and projecting from the pivot thereof, and a straight table having regularly-spaced graduations over which the index moves, substantially as described.

2. In a scale, the combination with the beam, the pan carried thereby, the poise having a lateral arm adjacent its pivot, and connections between said beam and arm for moving the outer end of the arm past the pivot of the poise and causing the swinging of the latter in irregular steps as weight is added to the pan; of an index connected and turning with the poise around the pivot thereof, and a straight table having regularly-spaced graduations over which the index moves, substantially as described.

3. In a scale, the combination with the beam, the pan carried thereby, the pendulum, a weight adjustable on the pendulum, and connections between the beam and pendulum for causing the swinging of the latter; of an index rigidly secured to the pendulum and projecting from the pivot thereof, and a straight-line computing-table having a plurality of rows of graduations over which said index moves, substantially as described.

4. In a scale, the combination with the beam, the pan carried thereby, the pendulum, a weight adjustable on the latter, and graduations thereon for setting the weight to regulate the degree of movement of the pendulum; of connections between the beam and pendulum for causing the swinging of the latter, an index mounted on the pendulum, and a straight-line computing-table having regularly-spaced graduations over which said index moves, substantially as described.

In testimony whereof I have affixed my signature in presence of two witnesses.

ALLEN DE VILBISS, JR.

Witnesses:

FRANK CLIFFORD PENAYAR,

ARTHUR ALLEN.

29,23

No. 649,915. Patented May 22, 1900.

1754

A. DE VILBISS, Jr.

SCALE.

(Application filed Jan. 24, 1899.)

(No Model.)

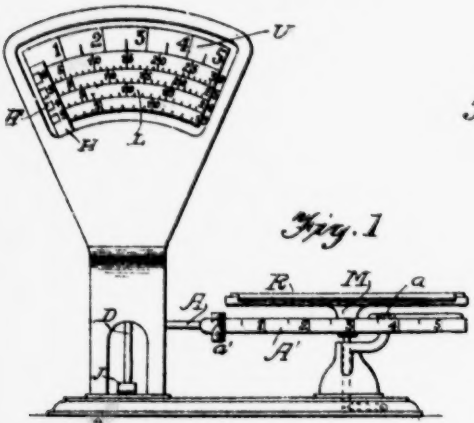

Fig. 1

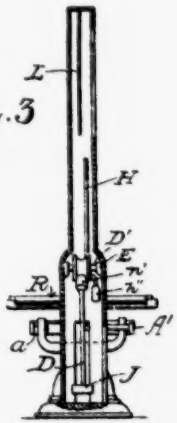

Fig. 3

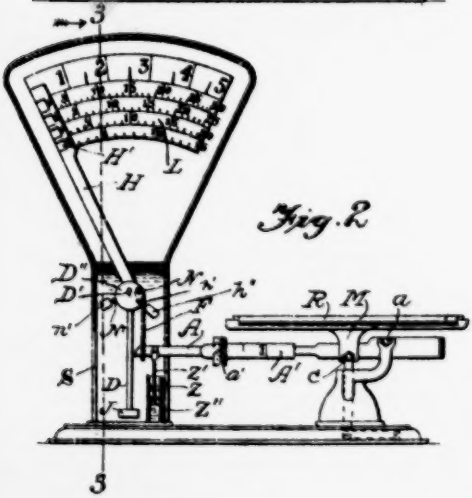

Fig. 2

WITNESSES:
Geo. E. Fuchs.
J. W. Jochum Jr.

INVENTOR:
Allen De Vilbiss, Jr.
By Collamer & Co.
Attorneys

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UNITED STATES PATENT OFFICE.

ALLEN DE VILBISS, JR., OF TOLEDO, OHIO, ASSIGNOR TO THE DE VILBISS COMPUTING SCALE COMPANY, OF SAME PLACE.

SCALE.

SPECIFICATION forming part of Letters Patent No. 649,915, dated May 22, 1900.

Application filed January 24, 1899. Serial No. 703,253. (No model.)

To all whom it may concern:

Be it known that I, ALLEN DE VILBISS, Jr., a citizen of the United States, and a resident of Toledo, Lucas county, State of Ohio, have invented certain new and useful Improvements in Scales; and my preferred manner of carrying out the invention is set forth in the following full, clear, and exact description, terminating with claims particularly specifying the novelty.

This invention relates to scales, and more especially to that class thereof known as "price-scales," which employ a pendulum and are adapted to compute the total selling price; and the object of the same is to effect improvements in devices of this character, more especially improvements over my former patent, dated March 14, 1899, and numbered 621,297.

To this end the invention consists in the details of construction hereinafter more fully set forth and claimed and as shown in the accompanying drawings, in which—

Figure 1 is a side elevation of this scale complete. Fig. 2 is a similar view with the front plate of the casing removed, and hence showing a section. Fig. 3 is a vertical section on the line 3 3 of Fig. 2.

Referring to the drawings by reference-letters, A designates the scale-beam, fulcrumed at *a* in the usual manner, as on a knife-edge, and C is a second pivot or knife-edge which in the present instance supports the standard M of the platform or table R, although it will be clear that by a slight change the well-known pan could be substituted for the table without departing from the spirit of my invention. Nothing new is claimed for this much of the device.

The letter A' designates an auxiliary or tare beam connected and moving in unison with the main scale-beam A, and on this auxiliary beam is mounted a weight *a'*, adapted to be moved to counterbalance or offset the weight of the crock or receptacle for containing the matter being weighed. Said auxiliary beam preferably extends past the fulcrum *a* and is made as long as convenient in order to give as large a space as possible for each unit of weight, and to this end it is marked with graduations, as shown.

The letter E, Fig. 3, designates bearings of any suitable character fast within the housing B. D' are knife-edges or pivots for said bearings, and D is a pendulum mounted thereon and hanging normally vertical within said housing, its body carrying a weight J of any kind and being adapted to swing outward through a slot S, properly located in the side of the housing, as shown. Around said knife-edges D' is a disk D'', rigid with the pendulum and having therein at one side of and normally above the center a knife-edge or pivot N, from which a link or connection F leads to the inner end of the beam A, as shown, and from the diametrically-opposite side of this disk projects a screw N', carrying an adjustable counterpoise-weight *n'* to offset the weight of the link F by reason of the fact that it stands always opposite the knife-edge N, and hence increases and decreases in leverage as the link increases and decreases.

The letter Z designates an upright cylinder containing mercury, oil, or other fluid agent sufficiently dense to impede movement therethrough, and Z' is a piston-rod led from any part, such as the scale-beam A, and having a piston Z'' necessarily moving in the fluid agent within said cylinder, by which means vibration of the scale-beam, and hence of its connected parts, is impeded or prevented.

H is a hand or index of any suitable light material and which is rigidly secured to the disk D'' in a position to stand normally oblique to a vertical, such hand preferably having in its body a series of openings H', inscribed herein opposite thereto with the numerals "8," "5," "4," "3," &c., although it will be clear that a hand inscribed in any proper manner and coöperating with the contiguous parts will answer equally well. It will be obvious that the marked portion of the hand moves through the arc of a circle, and in the present instance I provide a graduated table L, supported by the framework of the machine adjacent said portion of the hand and properly marked with several lines of figures to indicate the total cost of the article being weighed, this cost being the product of the number of units U, (pounds,) indicated also on the table, multiplied by the price per pound, as here indicated on the hand or in-

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dex. It will be obvious that fractions of a pound or fractions of a cent per pound can be indicated in the same way, as well as the totals thereof. In order to counterbalance the weight of the hand H, I provide a screw h', projecting radially from the disk D″, diametrically opposite the index and carrying a counterpoise-weight h''. It will be clear that these weights n' and h'' gain and lose in leverage reciprocally with the link and index and, if necessary, may be adjusted to more accurately counterbalance the same.

The operation of this improved scale is as follows: The machine being properly set up and adjusted, let us suppose that a one-pound crock is placed on the table R, in which it is desired to weigh three pounds of lard at six cents per pound. The seller first adjusts the counterbalance-weight a' to "1" on the tare-beam A′ or to any point where it will offset the weight of the crock, the proper point being indicated by the balance of the scale, at which time the index H will stand as seen in Fig. 1. The lard is then placed in the crock, the table R and beam A descend, and through the link F the disk D″ is turned on its center D′, thereby causing the index H to move over the table L until "3" in the units-line U is reached. Meanwhile the piston Z″ in the cylinder Z descends within the fluid and prevents undesirable vibrations of the index. Opposite the uppermost opening H′ here shown in the index is marked the figure "6," indicating that price per pound, and my table is so arranged that when the index stands to indicate "3" units the operator may read through this opening the product of three times six, or eighteen, which is the total cost of the merchandise being sold.

What I claim as new is—

1. In a scale, the combination with the central pivot, a disk mounted thereon and having a pendulum hanging normally vertical and an index standing normally oblique, a link-pivot connected with this disk and standing normally above said central pivot, a screw projecting from the disk opposite the link-pivot, and a counterbalancing-weight adjustable on this screw; of a table with which the index coacts, a beam mounted on a fulcrum, a pan or platform, and a link connecting said beam with the link-pivot, all substantially as and for the purpose set forth.

2. In a scale, the combination with the housing having bearings, a disk having a central pivot mounted therein, a pendulum hanging normally vertical from the disk, an index standing normally oblique to this pendulum, a link-pivot connected to the disk and normally above its central pivot, screws projecting from the disk, and counterbalancing-weights adjustable on such screws; of a beam mounted on a fulcrum, a pan or platform, and a link connecting the beam with the link-pivot, all substantially as described.

In testimony whereof I have hereunto subscribed my signature this 23d day of January, A. D. 1899.

ALLEN DE VILBISS, JR.

Witnesses:
NEWTON L. COLLAMER,
G. W. BALLOCH.

2926

1758

No. 12,137. REISSUED JULY 28, 1903.

A. DE VILBISS, Jr.

SCALE.

APPLICATION FILED NOV. 10, 1901.

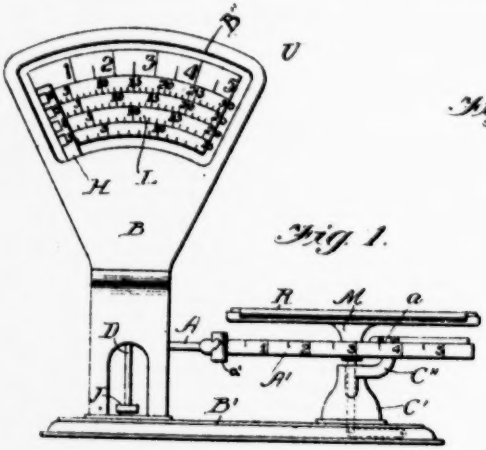

Fig. 1.

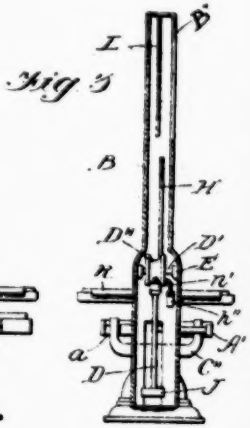

Fig. 3

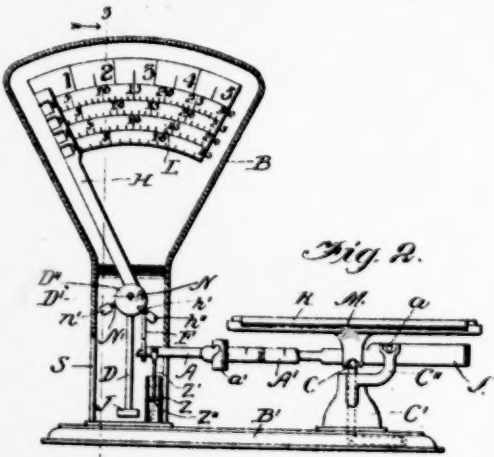

Fig. 2.

WITNESSES:

Harold S. Barnett.

Louis B. Erwin.

INVENTOR:

Allen De Vilbiss Jr.

By Rector & Hibben

his attys.

2927

No. 12,137. Reissued July 28, 1903.

UNITED STATES PATENT OFFICE.

1759

ALLEN DE VILBISS, JR., OF TOLEDO, OHIO, ASSIGNOR, BY MESNE ASSIGNMENTS, TO TOLEDO SCALE AND CASH REGISTER COMPANY, OF NEWARK, NEW JERSEY, A CORPORATION OF NEW JERSEY.

SCALE.

SPECIFICATION forming part of Reissued Letters Patent No. 12,137, dated July 28, 1903.

Original No. 649,915, dated May 22, 1900. Application for reissue filed November 16, 1901. Serial No. 82,576.

To all whom it may concern:

Be it known that I, ALLEN DE VILBISS, Jr., a citizen of the United States, residing at Toledo, in the county of Lucas and State of Ohio, have invented certain new and useful Improvements in Scales, of which the following is a description, reference being had to the accompanying drawings, forming part of this specification.

My invention relates to and has for its object the improvement of what are commonly known as "computing" or "price" scales, being scales which indicate not only the weight of the article or commodity being weighed, but also its value at any given rate per pound (or other unit of weight) within the capacity of the scale.

In the accompanying drawings, Figure 1 represents a front elevation of my improved scale; Fig. 2, a corresponding view with the housing or casing in section exposing the parts within, and Fig. 3 a vertical cross-section on the line 3 3 of Fig. 2.

The same letters of reference represent corresponding parts in the several views.

B represents a housing or case of suitable shape secured upon the base B', near one end thereof, and having its front side or wall provided in its upper portion with an opening B'', through which is exposed to view the price-computing table L, secured within the housing. Cooperating with this table is the upper end of an index-hand H, whose lower end is rigidly secured to a disk D'', provided upon its opposite sides with knife-edge projections D', resting in suitable bearings E upon the front and rear walls of the housing, Figs. 2 and 3. Rigidly secured to and depending vertically from the under side of the disk D'' is a pendulum D, provided with a weight J at its lower end. The index-hand H projects from the disk D'' at an angle to the pendulum D, so that when the latter hangs in its normal vertical position the upper end of the index-hand will extend across the left-hand end of the computing-table L, as shown, and when the lower end of the pendulum is swung to the left the upper end of the hand H will be moved to the right over the table L. The housing B is provided with an opening S in its left side, Fig. 2, through which the pendulum may swing.

Mounted upon the base B' near its right-hand end is a scale-beam support C', provided with two divergent supporting-arms C'', whose upper ends are suitably shaped to form supporting-bearings for knife-edge projections *a* on the scale-beam A, Figs. 2 and 3. The scale-beam A is forked or formed of two opposite members at its right-hand end embracing the supporting-arms C'', as shown, while at its left-hand end it extends through a vertical opening in the right-hand side wall of the housing B and has connected to it the lower end of a link F, whose upper end is connected to the disk D'' at a point on one side of and above the pivotal support D' of said disk, the disk in the present instance being provided with a projecting knife-edge or pivot N, over which hooks the upper end of the link F.

Supported upon the scale-beam A by knife-edge bearings C, at a point to the left of but adjacent the fulcrum-support *a* of said beam, is the standard M of the scale-platform (or pan) R, said platform in addition to being supported upon the scale-beam A being guided in its vertical movements and held from lateral displacement by the usual means within the support C. (Shown in the dotted lines in Figs. 1 and 2.)

As will be understood from the above-described construction, when the article or commodity which is to be weighed and whose value is to be computed is placed upon the platform B its weight will tend to depress the left-hand end of the scale-beam A, and thereby through the connection of said beam with the disk D'' by the link F to swing the pendulum D to the left from its normal vertical position and move the upper end of the index-hand H to the right over the computing-table L, the weight and leverage of the pendulum serving to automatically counterbalance the weight of the article placed upon the platform and cause the index-hand to come to rest at a point upon the table L determined by the weight of such article. This table L is curved in the arc of a circle concentric to the pivotal support of the index-

hand H and is provided with a plurality of curved lines separating it into a plurality of curved spaces, of which five are in the present instance shown in the drawings. The uppermost one of said spaces (marked U) is graduated and numbered to indicate units of weight and fractions thereof—in the present instance pounds and half-pounds from one to five. The remaining spaces are graduated and numbered to indicate the values of different articles or quantities of commodities at different prices per pound. Thus the lowermost one of said spaces is graduated and numbered to indicate the value of any given quantity (up to five pounds) at three cents per pound, the next space the same at four cents per pound, the next space at five cents per pound, and the uppermost one of the four spaces at six cents per pound. These prices per pound are indicated by numbers placed upon the index-hand H in line with the respective curved spaces mentioned, and the construction and adjustment and coöperation of the several parts of the scale are such that when the hand H is swung to the right over the table L to any given point by the weight of the article or commodity placed upon the platform R the value of such article at any of the prices per pound indicated upon the index-hand H will be shown in the corresponding curved space upon the table L at a point immediately adjacent said hand, while its weight will be shown in the uppermost curved space U. In the present instance the hand H is provided with a series of notches or openings adjacent the respective numbers upon it, through which the graduations and numbers upon the table L may be read.

For the purpose of counterbalancing the weight of the index-hand H the disk D'' is provided upon its side opposite said hand with a projecting screw h', upon which is mounted an adjustable counterbalancing-weight h'', while to counterbalance the weight of the link F the disk D'' is provided at a point diametrically opposite the link-pivot N with a second projecting screw N'', upon which is mounted an adjustable counterbalancing-weight n'.

To permit commodities to be weighed in receptacles placed upon the platform R and their weight and value to be properly indicated upon the computing-table notwithstanding the additional weight of such receptacles, I provide the main scale-beam A with a tare-beam A', upon which is mounted a tare-poise a'. This tare-beam is made of considerable length, extending beyond the fulcrum of the main beam, as shown in Fig. 1, in order to afford a large space for each unit of weight and in the present instance is graduated and numbered to indicate pounds and half-pounds from one to five to correspond with the graduations in the space U on the table L. When the tare-poise a' is in its left-hand or normal position, Figs. 1 and 2, the main scale-beam is exactly balanced and the index-hand H rests in the position shown upon the computing-table L. When a receptacle is placed upon the platform R preparatory to placing something in said receptacle to be weighed, the left-hand end of the scale-beam A will be depressed by the weight of such receptacle and the index-hand H swung to the right over the table L, indicating the weight of such receptacle in the space U; but by then sliding the tare-poise a' to the right along the tare-beam A' to a point or graduation corresponding to such weight indication the main scale-beam may be again balanced and the index-hand H brought back to normal position at the left-hand end of the computing-table, whereupon the commodity to be weighed in the receptacle may be placed in the latter and its weight and value be read upon the computing-table in the same manner as if it were placed directly upon the platform R.

To arrest the vibrations of the scale-beam A, and consequently of the index-hand H, and cause the latter to speedily come to rest at the proper point upon the table L after the article to be weighed has been placed upon the platform R, or after the poise a' has been adjusted upon the tare-beam A', I provide a dash-pot-arresting device comprising an upright dash-pot or cylinder Z, located within the base of the housing B and containing oil or other suitable fluid, in which moves a piston Z'', whose rod Z' is connected at its upper end to the scale-beam A adjacent the point of connection of the latter with the lower end of the link F, as shown in Fig. 2.

As will be understood from the foregoing description, the operation of weighing and computing the value of any article or commodity which may be placed directly upon the platform R (or in the usual scale pan or scoop which may be substituted for said platform) consists simply in placing such article or commodity upon said platform, whereupon both its weight and value will be instantly and automatically indicated upon the computing-table L, while if the commodity to be weighed requires a special receptacle for it upon the scale-platform the weight of such receptacle may be first counterbalanced by means of the poise upon the tare-beam, whereupon the placing of the article or commodity in said receptacle will cause its weight and value to be at once automatically indicated upon the computing-table. Likewise if instead of employing the scale to indicate the weight and value of a given article or a given quantity of any commodity it be desired to employ it for the purpose of weighing out the proper quantity of a commodity to be furnished for a given amount of money at a given rate per pound it is simply necessary to place upon the scale-platform a sufficient quantity of such commodity to move the index-hand H over the table L until it reaches the graduation indicating such amount of money in the particular curved space corresponding to the

given rate per pound. In both cases the weighing and computing operation is entirely automatic, simply requiring the placing of the article or commodity upon the scale-platform.

Having thus described my invention, I claim—

1. In a computing-scale, the combination of a price-computing table L provided with the graduations and numbers indicating the value of different quantities of commodities at different prices per pound, the index-hand H pivoted at one end and coöperating at its opposite end with the table L and provided with the series of numbers indicating prices per pound, the vertically-depending weighted pendulum D connected at its upper end with the index-hand H and moving in unison therewith, a single scale-beam A fulcrumed near its outer end upon a suitable support at *a* and having its inner end connected with the index-hand H and pendulum D by the link F, and the platform R supported entirely upon said single beam A between the fulcrum *a* and the link F; substantially as described.

2. In a computing-scale, the combination of the price-computing table L provided with the graduations and numbers indicating the value of different quantities of commodities at different prices per pound, the index-hand H pivoted at one end and coöperating at its opposite end with the table L and provided with a series of numbers indicating different prices per pound, the vertically-depending weighted pendulum D connected at its upper end with the index-hand H and moving in unison therewith, a single scale-beam A fulcrumed near its outer end upon a suitable support at *a* and having its inner end connected with the index-hand H and pendulum D by the link F, the platform R supported entirely upon the single beam A between its fulcrum *a* and the link F, the dash-pot Z and the piston Z″ moving therein and having its rod Z′ connected to a moving part of the scale mechanism; substantially as and for the purpose set forth.

3. In a computing-scale, the combination of the price-computing table L provided with the graduations and numbers indicating the value of different quantities of commodities at different prices per pound, the index-hand H pivoted at one end and coöperating at its opposite end with the table L and provided with the series of numbers indicating different prices per pound, the vertically-depending weighted pendulum D rigidly connected at its upper end with the index-hand H and moving in unison therewith, the scale-beam A fulcrumed near its outer end upon a suitable support at *a* and having its inner end connected with the index-hand H and pendulum D by the link F, the platform R mounted on the beam A between its fulcrum *a* and the link F, the tare-beam A′ carried by the scale-beam A in front of and parallel with the same, and the poise *a*′ mounted on said tare-beam, substantially as and for the purpose described.

4. In a computing-scale, the combination of the price-computing table L provided with the graduations and numbers indicating the value of different quantities of commodities at different prices per pound, the index-hand H pivoted at one end and coöperating at its other with the table L and provided with the series of numbers indicating different prices per pound, the weighted pendulum D rigidly connected at its upper end with the index-hand H and moving in unison therewith, the scale-beam A fulcrumed near its outer end upon a suitable support at *a* and having its inner end connected with the index-hand H and pendulum D, the platform R mounted on the beam A between its fulcrum *a* and the link F, the tare-beam A′ carried by the scale-beam A, the poise *a*′ mounted on said tare-beam, the dash-pot Z, and the piston Z″ moving therein and having its rod Z′ connected to the scale-beam A for arresting the vibration of the scale-beam after movement of the poise *a*′ upon the tare-beam and also after the placing of the commodity to be weighed upon the platform or in the receptacle thereon; substantially as described.

5. In a computing-scale, the combination of a price-computing table L provided with graduations and numbers indicating the values of different quantities of commodities at different prices per pound, the disk or hub D″ provided with the knife-edge trunnions D′ projecting from its front and rear sides and resting in supporting-bearings E, the index-hand H rigidly secured at its lower end to the disk D″ and at its upper end coöperating with the table L and provided with a series of numbers indicating prices per pound, the vertically-depending weighted pendulum D rigidly secured at its upper end to the disk D″, the link-pivot N carried by the disk D″ and normally standing at a point above the pivotal axis of the latter, means carried by the disk D″ for counterbalancing the weight of the index-head H and link-pivot N, the scale-beam A fulcrumed near its outer end upon a suitable support at *a* and connected at its inner end with the link-pivot N by the link F, and the platform R mounted on the beam A between the fulcrum *a* and the link F; substantially as described.

6. In a computing-scale, the combination of a price-computing table L provided with graduations and numbers indicating the values of different quantities of commodities at different prices per pound, the disk or hub D″ provided with the knife-edge trunnions D′ projecting from its front and rear sides and resting in supporting-bearings E, the index-hand H rigidly secured at its lower end to the disk D″ and at its upper end coöperating with the table L and provided with a series of numbers indicating prices per pound, the

vertically-depending weighted pendulum D rigidly secured at its upper end to the disk D'', the link-pivot N carried by the disk D'' and normally standing at a point above the pivotal axis of the latter, means carried by the disk D'' for counterbalancing the weight of the index-hand H and link-pivot N, the scale-beam A fulcrumed near its outer end upon a suitable support at *a* and connected at its inner end with the link-pivot N by the link F, the platform R mounted on the beam A between the fulcrum *a* and the link F, the dash-pot Z and the piston Z'' moving therein and having the upper end of its rod Z' connected to the scale-beam A adjacent the link F; substantially as and for the purpose described.

7. In a computing-scale, the combination of a price-computing table L provided with graduations and numbers indicating the values of different quantities of commodities at different prices per pound, the disk or hub D'' provided with the knife-edge trunnions D' projecting from its front and rear sides and resting in supporting-bearings E, the index-hand H rigidly secured at its lower end to the disk D'' and at its upper end coöperating with the table L and provided with a series of numbers indicating prices per pound, the vertically-depending weighted pendulum D rigidly secured at its upper end to the disk D'', the link-pivot N carried by the disk D'' and normally standing at a point above the pivotal axis of the latter, means carried by the disk D'' for counterbalancing the weight of the index-hand H and link-pivot N, the scale-beam A fulcrumed near its outer end upon a suitable support at *a* and connected at its inner end with the link-pivot N by the link F, the platform R mounted on the beam A between the fulcrum *a* and the link F, the tare-beam A' mounted on the scale-beam A, and the poise *a'* mounted on said tare-beam; substantially as and for the purpose described.

8. In a computing-scale, the combination of a price-computing table L provided with graduations and numbers indicating the values of different quantities of commodities at different prices per pound, the disk or hub D'' provided with the knife-edge trunnions D' projecting from its front and rear sides and resting in supporting-bearings E, the index-hand H rigidly secured at its lower end to the disk D'' and at its upper end coöperating with the table L and provided with a series of numbers indicating prices per pound, the vertically-depending weighted pendulum D rigidly secured at its upper end to the disk D'', the link-pivot N carried by the disk D'' and normally standing at a point above the pivotal axis of the latter, means carried by the disk D'' for counterbalancing the weight of the index-hand H and link-pivot N, the scale-beam A fulcrumed near its outer end upon a suitable support at *a* and connected at its inner end with the link-pivot N by the link F, the platform R mounted on the beam A between the fulcrum *a* and the link F, the tare-beam A' mounted on the scale-beam A, the poise *a'* mounted on said tare-beam, the dash-pot Z, and the piston Z'' moving therein, and having the upper end of its rod Z' connected to the scale-beam adjacent the link F; substantially as and for the purpose set forth.

9. The herein-described computing-scale comprising the base B', the housing B mounted thereon near one end and provided in its upper portion with the opening B'', the price-computing table L located within the housing B and exposed to view through said opening, the disk D'' pivotally supported in the housing B, the index-hand H rigidly secured at its lower end to the disk D'' and coöperating at its upper end with the price-computing table L, the weighted pendulum D rigidly secured at its upper end to the disk D'', the scale-beam support C' C'' mounted upon the opposite end of the base B' from the housing B, the scale-beam A fulcrumed thereon at *a*, the link F connecting the opposite end of the beam A with the disk D'', means on said disk for counterbalancing the weight of the link F and index-hand H, the platform R mounted on the beam A between its fulcrum *a* and the link F, the dash-pot Z and the piston Z'' moving therein and having the upper end of its rod Z' connected to the beam A adjacent the link F; substantially as described.

10. In a scale, the combination with the central pivot, a disk mounted thereon and having a pendulum hanging normally vertical, and an index standing normally oblique, a link-pivot connected with this disk and at a point normally above said central pivot, a screw projecting from the disk opposite the link-pivot and a counterbalancing-weight adjustable on this screw; of a table with which the index coacts, a beam mounted on a fulcrum, a pan or platform, and a link connecting said beam with the link-pivot, all substantially as and for the purpose set forth.

11. In a scale, the combination with the housing having bearings, a disk having a central pivot mounted therein, a pendulum hanging normally vertical from the disk, an index standing normally oblique to this pendulum, a link-pivot connected to the disk and normally above its central pivot, screws projecting from the disk, and counterbalancing-weights adjustable on said screws; of a beam mounted on a fulcrum, a pan or platform, and a link connecting the beam with the link-pivot, all substantially as described.

ALLEN DE VILBISS, JR.

Witnesses:
HENRY THEOBALD,
EMMA EIBEN.

1764

No. 667,652. Patented Feb. 5, 1901.

A. DE VILBISS, JR.

SCALE.

(Application filed July 18, 1900.

No Model.)

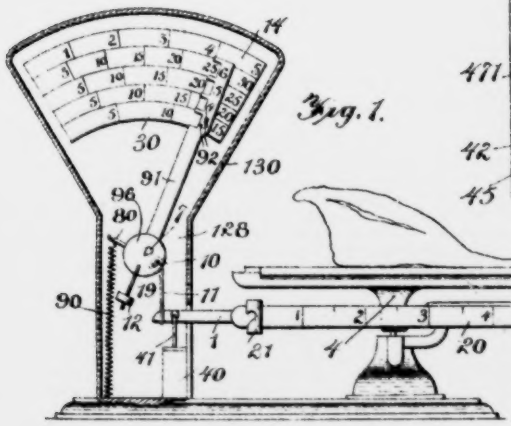

Fig. 1.

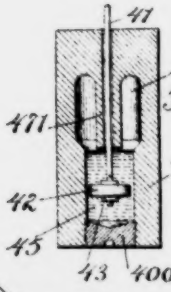

Fig. 3.

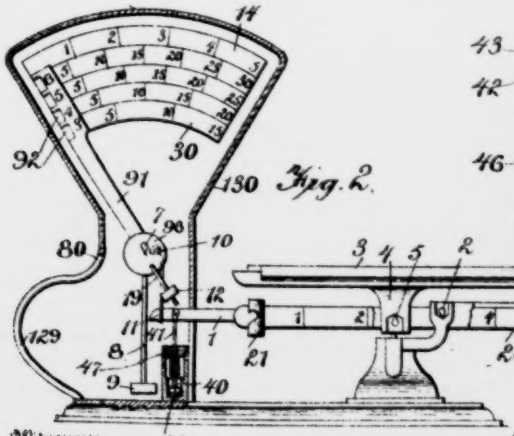

Fig. 2.

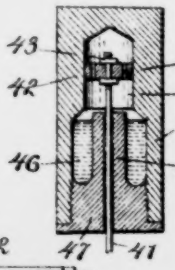

Fig. 4.

Witnesses:

Geo. E. Buck.

Enoch Edmonston Jr.

Inventor:

Allen De Vilbiss Jr.

By Collamer & Co.

Attorneys.

2932

UNITED STATES PATENT OFFICE.

ALLEN DE VILBISS, JR., OF TOLEDO, OHIO, ASSIGNOR TO THE DE VILBISS COMPUTING SCALE COMPANY, OF SAME PLACE.

SCALE.

SPECIFICATION forming part of Letters Patent No. 667,652, dated February 5, 1901.

Application filed July 18, 1900. Serial No. 24,065. (No model.)

To all whom it may concern:

Be it known that I, ALLEN DE VILBISS, JR., a citizen of the United States, and a resident of Toledo, Lucas county, State of Ohio, have invented certain new and useful Improvements in Scales, (Case S;) and my preferred manner of carrying out the invention is set forth in the following full, clear, and exact description, terminating with claims particularly specifying the novelty.

This invention relates to weighing-scales, preferably of that class which compute or indicate the total weight or total price by a hand standing normally at zero, but moved over a table by the load and coming to rest when the same is offset by a pendulum, by a spring, or by any other automatic means; and the object of the same is to provide a device for overcoming the well-known vibration of the hand after the load is applied and before the hand comes to rest.

To this end the invention consists in a dash-pot adapted to contain a liquid, preferably oil, within which moves a piston whose rod is connected to some part of the weighing mechanism, that portion of the dash-pot above the part in which a piston moves having a chamber of greater diameter and provided with a depending lip surrounding the opening for the piston-rod.

The following specification describes briefly the general construction and operation and at greater length the improvements and their advantages, all as illustrated in the accompanying drawings, wherein—

Figure 1 is a sectional view through one type of my scale embodying the use of a spring to offset the weight of the load and the hand as moved by a load to four pounds. Fig. 2 is a similar section with the hand at zero, excepting that herein a pendulum and weight are used instead of a spring. Figs. 3 and 4 are enlarged sectional views of the dash-pot, the former of slightly-modified construction, the latter with the entire dash-pot inverted, and the two views illustrating different constructions of pistons.

1 is the main scale-beam, fulcrumed at 2 on a support which rises from the base or frame, and 3 is a pan or platform having a standard 4, pivotally supported, as at 5, upon said beam. The base supports a casing consisting of an upright body portion 128, having a lateral extension 129 and a housing 130, open at its front to expose a table 30, which is marked on its face with several rows of price-totals and near its upper edge with a single row of weight-totals 14.

Mounted on knife-edge bearings 7 within the body portion of the casing is a disk 96, from which hangs rigidly a pendulum 8, having a fixed weight 9 at its lower end. Fixed to and rising from the disk oblique to the pendulum is a hand or index 91, preferably having notches 92 in its active face, adjacent which are numerals to coact with the several lines of price-totals. Projecting from the disk diametrically opposite the center of gravity of the hand is a screw 19, on which is an adjustable nut 12, forming a counterbalance for the weight which the hand possesses when it stands oblique. In the disk at a point between the screw and hand is a knife-edge pivot 10, whose edge is above that of the central pivot 7 when the pendulum is vertical and over which hangs a link 11, that extends downward and is connected with the scale-beam.

The construction shown in Fig. 1 differs from that above described only in that a spring 90 is substituted for the weighted pendulum, which spring is connected at one end with the base of the casing and at the other end with a rod 80, projecting from the disk at a proper point and angle, so that the tension of the spring shall hold the hand normally at zero. When the spring is used, it is obviously not necessary to have the lateral extension 129 on the casing. Although not shown in the drawings, the front of the casing is removable, or that side thereof near the operator may be left open, so that access to the interior is permitted. I show and describe herein a weighted pendulum and a spring; but I desire to be understood as intending to include any means for automatically counterbalancing or offsetting the weight of the load.

20 is a tare-beam moving in unison with the main beam and preferably extending past both pivots 2 and 5. The tare-beam may have figures marked thereon, as shown, and 21 is the tare weight.

is a cylinder mounted by preference within the body portion of the casing about where shown, and 41 is a rod pivoted to the scale-beam and supporting a piston 42, which may be adjustable, as by nuts 43, above and below. Interiorly the cylinder is bored out at its lower end to form a dash-pot 45 of relatively smaller diameter and at its upper end to form a chamber 46 of relatively larger diameter.

47 is a cover closing the upper end of the cylinder, and hence of the chamber, and 471 is a lip depending rigidly from this cover into the chamber and nearly to the bottom thereof, which is the top of the dash-pot. The cover and lip are pierced with an opening through which loosely passes the rod 41, and the piston 42 is either somewhat smaller in diameter than the dash-pot, as seen in Fig. 3, or it may have openings 44 through its body, as seen in Fig. 4. Either or any equivalent construction permits passage through or by the piston of oil or other liquid with which the dash-pot is evenly filled. When a scale containing this form of dash-pot is inverted, the liquid runs out of the dash-pot into the chamber, whose diameter is greater than that of the dash-pot. Hence the liquid then stands as seen in Fig. 4, and the necessity for packing around the rod is obviated.

The weight 12 counterbalances the hand 91. The pendulum with its weight or weights hangs normally vertical and swings outward into the extension 129 as the disk 96 turns on its pivot 7, or if the spring be used the turning of the disk moves the rod 80 upward and distends the spring, and the other parts are so arranged and proportioned that when the tare weight is at zero they are exactly counterbalanced over the fulcrum 2. When a load is placed on the platform, the inner end of the beam 1 descends, the link 11 turns the disk, and the hand 91 moves over the table, while the pendulum rises and gains weight sufficient to balance the load, or the spring is distended sufficiently to accomplish the same end. Meanwhile the piston descends in the liquid, and the density of the latter causes the hand to come quickly to rest. Had the load been lard, for instance, the grocer would have first placed a crock on the platform and immediately moved the tare weight 21 until the hand returned to zero from the point to which the weight of the crock had moved it. Thereafter the weighing of the commodity proceeds as above described.

The row 14 gives the total of weight, the figures on the hand are the price per pound, and the figure in the table 30 which is exposed through the notch 92 opposite the price per pound is the total price. It is obvious that the device as herein described could be used in connection with an automatic scale which did not compute. This could be done by omitting all rows on the table excepting the weight-row 14, and that could clearly contain a scale to represent pounds and fractions thereof.

In Fig. 3 is shown a slight modification over the construction elsewhere illustrated. Here the upper end or cover 47 of the cylinder is an integral part thereof, and access to the interior is gained through a plug 400, screwed or otherwise inserted into the lower end of the cylinder. I consider either construction useful, and they will produce identically the same result in the operation of the whole. However, I do not wish to be limited to gaining access to the interior of the cylinder through either end, as it might be accomplished by making any part thereof removable.

What is claimed as new is—

1. In a weighing-scale, the combination of the supporting-frame, a dash-pot secured thereto and adapted to contain a liquid; of a piston-rod and piston carried by a moving part of the weighing mechanism, and arranged to move in the dash-pot, the dash-pot having above the parts thereof in which the piston moves a chamber of greater diameter, provided with an internal depending lip surrounding the opening for the piston-rod.

2. In a weighing-scale, the combination with the supporting-frame, the weighing mechanism, a piston, and a rod connecting it with said mechanism; of a cylinder mounted on the frame and having at its lower portion a dash-pot in which the piston moves and at its upper portion a chamber of greater diameter than the dash-pot, a lip depending from the upper end of the cylinder and surrounding the piston-rod, and a plug closing the bottom of the dash-pot.

3. In a weighing-scale, the combination with the supporting-frame, the weighing mechanism, a piston, and a rod connecting it with said mechanism; of a cylinder mounted on the frame and having at its lower portion a dash-pot in which the piston moves and at its upper portion a chamber of greater diameter than the dash-pot, and a plug closing the bottom of the dash-pot.

4. In a weighing-scale, the combination with the supporting-frame, the weighing mechanism, a piston, and a rod connecting it with the said mechanism; of a cylinder mounted on the frame and having at its lower portion a dash-pot in which the piston moves and at its upper portion a chamber of greater diameter than the dash-pot, and a lip depending from the upper end of the cylinder and surrounding the piston-rod, part of said cylinder being removable so as to provide access to its interior.

In testimony whereof I have hereunto subscribed my signature this 17th day of July, A. D. 1900.

ALLEN DE VILBISS, Jr.

Witnesses:
N. L. COLLAMER,
G. W. BALLOCH.

No. 674,646. Patented May 21, 1901.

1768

A. DE VILBISS, Jr.

SCALE.

(Application filed Sept. 17, 1900.)

(No Model.)

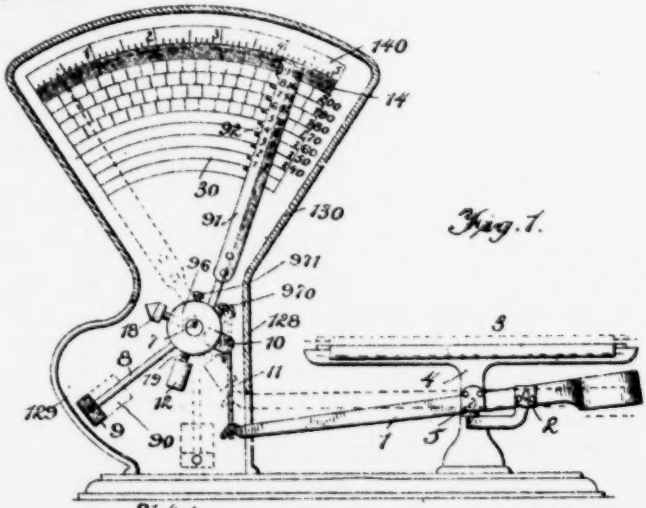

Fig. 1.

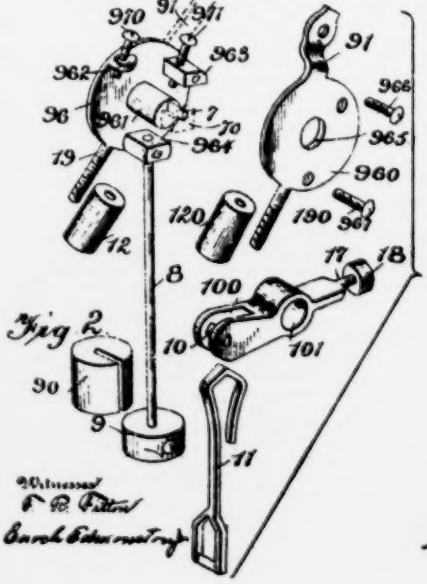

Fig. 2.

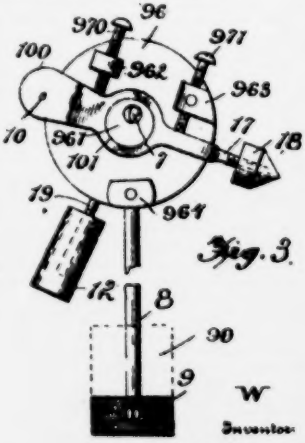

Fig. 3.

Witnesses:
C. P. Fitzgerald
Barrett Edmonston Jr.

Inventor:
Allen De Vilbiss Jr.
by
Williamson & Co.
Attorneys

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1769

UNITED STATES PATENT OFFICE.

ALLEN DE VILBISS, JR., OF TOLEDO, OHIO, ASSIGNOR TO THE DE VILBISS COMPUTING SCALE COMPANY, OF SAME PLACE.

SCALE.

SPECIFICATION forming part of Letters Patent No. 674,646, dated May 21, 1901.

Application filed September 17, 1900. Serial No. 30,281. (No model.)

To all whom it may concern:

Be it known that I, ALLEN DE VILBISS, Jr., a citizen of the United States, and a resident of Toledo, Lucas county, State of Ohio, have invented certain new and useful Improvements in Scales, (Case W;) and my preferred manner of carrying out the invention is set forth in the following full, clear, and exact description, terminating with claims particularly specifying the novelty.

This invention relates to scales of that class which compute or indicate the total weight and total price by a hand standing normally at zero, but moved over the table by the load and coming to rest when the same is counterbalanced; and the object of the same is to improve the construction of parts so that in assembling them a perfect counterbalance of the hand and link can be secured and after such assembling an adjustment of the link-pivot can be effected for the purpose of causing the hand to move to the proper degree and in proper steps over the table, which adjustment does not throw the pendulum out of its true perpendicular position.

The present invention is an improvement over my previous patents in this line, and embodies practically the same essential features of construction, to which are added in this case certain details of construction explained at length below and set forth in the claims appended, the whole being constructed as hereinafter described and as illustrated in the accompanying drawings, wherein—

Figure 1 is a sectional view through one type of my scale, showing the hand as moved to four pounds. Fig. 2 is a perspective detail of the link-carrier, the pendulum and its disk, the hand and its disk, the link, and the removable weight, all slightly separated and viewed from the rear. Fig. 3 is a rear elevation of all of said parts assembled, excepting the hand and its disk.

1 is the main scale-beam, fulcrumed at 2 on a support which rises from the base, and 3 is a pan or platform having a standard 4 pivotally supported, as at 5, upon said beam. The base supports a casing consisting of an upright body portion 128 (preferably having a lateral extension 129) and provided with a housing 130, open at its front to expose a table 30, which is marked on its face with several rows of price-totals and near its upper edge with two rows of weight-totals 140 and 14, the latter being colored differently from the former, as indicated in shaded lines on the drawings.

Moving over and coöperating with the table 30 is a hand or index 91, preferably having notches 92 in its active edge, adjacent which are numerals to coact with the several lines of price-totals on the table, and in the present instance two rows of such numerals are shown on two portions of the hand, colored to correspond with the two differently-colored rows of weight-totals on the table. The hand is supported indirectly by or attached to a disk 96, having knife-edge bearings 7 supported upon blocks 70 within the body portion of the casing, and from this disk hangs rigidly a pendulum 8, having a fixed weight 9 at its lower end, colored to correspond with one of the rows of weight-totals, and in the present instance there is provided an additional weight 90, colored to correspond with the other row of weight-totals and adapted to be placed upon the pendulum above the fixed weight 9. This hand and pendulum stand on lines at slight angles to each other and projecting from the active edge of the knife-bearings 7, and when the pendulum stands perpendicular the hand stands at zero on the table 30. 11 is a link connecting the scale-beam with a point 10 on the disk above the main pivot 7. The parts are so arranged that when the load is placed on the platform the beam and link descend and the link-pivot 10 moves from a position normally above the main pivot 7 downward past the line thereof, so that the hand is caused to move over the table to the proper point. The row 14 gives the total weight, the figures on the hand are the price per pound, and the figure in the table which is exposed through the notch 92 opposite the price per pound is the total price. When the light weight 90 is added to the pendulum, the hand will move to a less degree and the light row 140 on the table and the figures on the light portion of the hand must be used, the price-totals still being

found in the proper notches. I reserve the right, however, to employ the mechanism herein described on other types of scales.

In assembling the parts of a scale of this type it has been found to be extremely difficult to counterbalance the weight of the hand and to counterbalance the weight of the link, because the adjustment of the counterbalance of one of these parts destroys the accuracy of the counterbalance of the other. Hence experience has proved it advisable to adjust these counterbalances separately, as described below. Furthermore, after the scale is set up ready for use and with the hand standing accurately on the zero-line when the pendulum is perpendicular it is often found on testing the scale that the hand does not accurately register with all the indicating-lines on the table. This is due to the fact that the extremes of movement of the link-pivot 10 are not in proper relation to a horizontal line drawn through the active edge of the main pivot 7. The present invention consists in details of construction described below in connection with a scale of the type illustrated herein and set forth above, whereby the difficulties just mentioned can be overcome quickly, easily, accurately, and permanently at the time the parts are assembled.

At the center of the disk 96 is a hub 961, and the knife-edge 7 extends longitudinally through this hub and projects beyond its ends in such a manner that the active edges which rest on the bearings in the casing are exactly coincident with the axial center of the hub. Projecting from said disk are a number of lugs 962, 963, and 964, and in the present case the last-mentioned lug is beneath the knife-edge and rigidly supports the pendulum 8. Projecting from the edge of the disk on a line diametrically opposite the active edge of the hand 91 is a screw 19, on which is a nut 12, forming a means for adjustably counterbalancing the weight of the hand.

As best seen in Fig. 2, the link-carrier consists of a casting forked at one end, as at 100, and carrying the link-pivot 10 between the arms of this fork. At the center of its length it has an eye 101, which fits accurately around the hub 961, and at the extremity of its end opposite the fork it carries a screw 17, standing on a line drawn through the active edges of the link-pivot 10 and the main pivot 7, on which screw is a nut 18, forming a means for adjustably counterbalancing the weight of the link.

960 is a disk, from one side of which projects the hand 91, and from its edge diametrically opposite said hand projects a screw 190, on which is a nut 120, forming an additional means for adjustably counterbalancing the weight of the hand. Through the center of this disk is an opening 965, adapted to fit over the outer end of the hub 961, and at other points through this disk are holes 966, which are passed screws 968 and 967, which take into the lugs 963 and 964 for fastening the two disks in proper spaced position with the link-carrier between them.

970 and 971 are screws passing downward through the lugs 962 and 963 and bearing upon the link-carrier at opposite sides of the point where it is pivoted on the hub.

The parts are of the desired sizes, proportions, and materials, and the exact shapes of parts other than as herein specified are a matter of indifference.

In assembling the parts above described the disks are connected by means of the screws 968 and 967 and the connected pendulum and hand are inserted in the casing, after which the nuts 12 and 120 are adjusted until the hand is counterbalanced so that it stands accurately over the zero-line when the pendulum hangs vertical, whether the removable weight 90 is used or not. The parts are then removed from the casing, the disk 960 disconnected from the disk 96, the link-carrier inserted, the disk 960 reattached, and the parts again inserted in the casing. The link 11 is then made to connect the link-pivot 10 with the scale-beam 1, after which the nut 18 is adjusted on the screw 17 to counterbalance the link-pivot and link, and this adjustment is continued until the hand again stands accurately over the zero-line on the table when the pendulum hangs vertical, whether the removable weight 90 is used or not. The scale is now set up ready for use; but before being put on the market it should be tested to ascertain if the active edge of the hand properly registers with all lines on the table, and such test is effected by placing a known weight on the platform and noting the position to which the hand moves. If the movement is excessive, it indicates that the path of the link-pivot is too high relative to the main pivot, and if the movement of the hand is not sufficient it indicates that the path of the link-pivot is too low. To correct either of these inaccuracies, one of the screws 970 and 971 is loosened, while the other is tightened, which operation obviously rocks the link-carrier slightly over the hub, and hence changes the relative position of the active edges of the link-pivot and the main pivot, and this can readily be done without destroying the counterbalance of the hand or the counterbalance of the link.

It is obvious that considerable change in the details of construction may be made without departing from the essential principle of my invention. The present specification and drawings describe and illustrate only the manner I prefer at this time for carrying out the general idea. It is clear that the various weights could be applied to and adjustably held on their supports in many different ways, either the weight 12 or 120 might be rigid and the adjustability of the other would probably suffice, the link-carrier could be rocked or adjusted around the hub by other mechanism, one of the disks might possibly

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be entirely omitted and all the other parts carried by the remaining disk—the hand is as shown in dotted lines in Fig. 2—and many other changes in the construction of parts and additions to the entire machine could be adopted without detriment to the whole.

What is claimed as new is—

1. In a scale, the combination with the casing supporting a table, the scale-beam, and a pan or platform; of a disk having a hub, a main pivot consisting of a knife-edge extending through said hub with its active edge coincident with the axis thereof, a pendulum rigidly attached to and depending from said disk, a second disk having an opening adapted to embrace said hub, means for holding the disks connected, a hand carried by said second disk, and devices carried by the disks for adjustably counterbalancing the weight of the hand, substantially as described.

2. In a scale, the combination with the casing supporting a table, the scale-beam, and a pan or platform; of a disk having a hub, a main pivot consisting of a knife-edge extending through said hub with its active edge coincident with the axis thereof, a plurality of lugs on said disk, a pendulum rigidly attached to and depending from one of the lugs, a second disk having a central opening adapted to surround said hub, a hand or index whose active edge projects on a line radial to the center of said opening, screws passing through this disk and into lugs on the first disk for connecting the two disks, a screw projecting radially from one of the disks diametrically opposite the hand, and a counterbalance-weight adjustable thereon, all substantially as and for the purpose set forth.

3. In a scale, the combination with the casing supporting a table, the scale-beam, and a pan or platform; of a disk having a hub, a main pivot consisting of a knife-edge extending through said hub with its active edge coincident with the axis thereof, a pendulum rigidly attached to and depending from said disk, a second disk having an opening adapted to embrace said hub, means for holding the disks connected, screws projecting from the disks at points diametrically opposite the hand, and counterbalance-weights adjustably mounted thereon, substantially as and for the purpose set forth.

4. In a scale, the combination with the casing supporting a table, the scale-beam, and a pan or platform; of a disk having a hub, a main pivot consisting of a knife-edge extending through said hub with its active edge coincident with the axis thereof, a pendulum rigidly attached to and depending from said disk, a second disk having an opening adapted to embrace said hub, means for holding the disks connected, a hand carried by said second disk and standing at an angle to the pendulum, devices carried by the disks for adjustably counterbalancing the weight of the hand, a link-pivot supported by the hub and normally above the plane of the main pivot, and a link connecting the link-pivot with the scale-beam, substantially as described.

5. In a scale, the combination with the casing supporting a table, the scale-beam, and a pan or platform; of a disk having a hub, a main pivot consisting of a knife-edge extending through said hub with its active edge coincident with the axis thereof, a pendulum rigidly attached to and depending from said disk, a second disk having an opening adapted to embrace said hub, means for holding the disks connected, a hand carried by said second disk and standing at an angle to the pendulum, devices carried by the disks for adjustably counterbalancing the weight of the hand, a link-pivot supported by the hub and normally above the plane of the main pivot, means for adjusting the position of this link-pivot relatively to the pendulum, all substantially as and for the purpose set forth.

6. In a scale, the combination with the casing supporting a table, the scale-beam, and a pan or platform; of a disk having a hub, a main pivot consisting of a knife-edge extending through said hub with its active edge coincident with the axis thereof, a plurality of lugs on said disk, a pendulum rigidly attached to and depending from one of the lugs, a second disk having a central opening adapted to surround said hub, a hand or index whose active edge projects on a line radial to the center of said opening, screws passing through said second disk and into the lugs on the first disk for connecting the two disks, means for counterbalancing the weight of the hand, a link-pivot supported by the hub normally above the plane of the main pivot, means for adjusting the position of this link-pivot relatively to the pendulum, and a link connecting the link-pivot with the scale-beam, substantially as described.

7. In a scale, the combination with the casing supporting a table, the scale-beam, and a pan or platform; of a disk having a hub, a main pivot consisting of a knife-edge extending through said hub with its active edge coincident with the axis thereof, a pendulum rigidly attached to and depending from said disk, a second disk having an opening adapted to embrace said hub, means for holding the disks connected, a hand carried by one disk and standing at an angle to the pendulum, devices carried by the disks for adjustably counterbalancing the weight of the hand, a link-pivot supported by the hub and normally above the plane of the main pivot, means for adjusting the position of this link-pivot relatively to the pendulum, and means for counterbalancing the weight of the link-pivot and link, substantially as and for the purpose set forth.

8. In a scale, the combination with the casing supporting a table, the scale-beam, and a pan or platform; of a disk having a hub, a main pivot consisting of a knife-edge extending through said hub with its active edge co-

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incident with the axis thereof, a plurality of lugs on said disk, a pendulum rigidly attached to and depending from one of the lugs, a second disk having a central opening adapted to surround said hub, a hand or index whose active edge projects on a line radial to the center of said opening, screws passing through said disk and into the lugs on the first disk for connecting the two disks, means for counterbalancing the weight of the hand, a link-pivot supported by the hub normally above the plane of the main pivot, means for adjusting this link-pivot relatively to the pendulum, a link connecting the link-pivot with the scale-beam, and means for counterbalancing the weight of the link-pivot and link, all substantially as set forth.

9. In a scale, the combination with the casing supporting a table, the scale-beam, and a pan or platform; of a disk having a hub, a main pivot whose active edge extends through the axis thereof, a pendulum depending rigidly from said disk, a second disk connected with the first disk, a hand projecting radially from one disk, means for counterbalancing its weight, an eye surrounding said hub and having an arm supporting a link-pivot, a link connecting said pivot with the scale-beam, and devices carried by one of the disks for adjusting the position of said arm relatively to the pendulum, all substantially as described.

10. In a scale, the combination with the casing supporting a table, the scale-beam, and a pan or platform; of a disk having a hub, a main pivot whose active edge extends through the axis thereof, a pendulum depending rigidly from said disk, a second disk connected with the first disk, a hand projecting radially from one disk, means for counterbalancing its weight, a link-carrier having an eye surrounding said hub and an arm supporting a link-pivot, a link connecting said pivot with the scale-beam, means on the link-carrier for counterbalancing the weight of the link-pivot and link, and devices carried by one of the disks for adjusting the position of said arm relatively to the pendulum, all substantially as described.

11. In a scale, the combination with the casing supporting a table, the scale-beam, and a pan or platform; of a disk having a hub, a main pivot whose active edge extends through the axis thereof, a pendulum depending rigidly from said disk, a second disk connected with the first disk, a hand projecting radially from one disk, means for counterbalancing its weight, a link-carrier having a fork at one end and a screw at the other, a link-pivot within the fork, a link connecting this pivot with the scale-beam, a weight on said screw for counterbalancing the weight of the link-pivot and link, and means for adjusting the position of the link-pivot relatively to the pendulum, substantially as and for the purpose set forth.

12. In a scale, the combination with the casing supporting a table, the scale-beam, and a pan or platform; of a disk having a hub, a main pivot whose active edge extends through the axis thereof, a pendulum depending rigidly from said disk, a second disk connected with the first disk, a hand projecting radially from one disk, means for counterbalancing its weight, a link-carrier pivoted between its ends on said hub, a link-pivot supported by one of its arms, a link connecting this pivot with the scale-beam, lugs on one disk at opposite sides of the hub, and screws taking through the lugs against opposite arms of the link-carrier, substantially as and for the purpose set forth.

13. In a scale, the combination with the casing supporting a table, the scale-beam, and a pan or platform; of a disk having a hub, a main pivot whose active edge extends through the axis thereof, a pendulum depending rigidly from said disk, a second disk connected with the first disk, a hand projecting radially from one disk, means for counterbalancing its weight, a link-carrier pivoted between its ends on said hub, a link-pivot supported by one of its arms, a link connecting this pivot with the scale-beam, a screw carried by the other of its arms, a counterbalance-weight adjustable thereon, lugs on one disk at opposite sides of the hub, and screws taking through the lugs against opposite arms of the link-carrier, all substantially as and for the purpose set forth.

14. In a scale, the combination with the casing supporting a table, the scale-beam, and a pan or platform; of a disk having a hub, a main pivot extending therethrough, a pendulum depending rigidly from the disk, a hand supported by the disk at an angle to the pendulum, means on the disk for adjustably counterbalancing the hand, a link-carrier pivoted between its ends on said hub, a link-pivot supported by one of its arms, a link connecting this pivot with the scale-beam, a screw carried by the other of its arms, a counterbalance-weight adjustable thereon, lugs on the disk at opposite sides of the hub, and screws taking through the lugs against opposite arms of the link-carrier, all substantially as and for the purpose set forth.

15. In a scale, the combination with the casing supporting a table, the scale-beam, and a pan or platform; of a disk having a hub, a main pivot extending therethrough, a pendulum depending rigidly from the disk, a hand supported by the disk at an angle to the pendulum, means on the disk for adjustably counterbalancing the hand, a link-carrier having an eye surrounding said hub and two arms radiating therefrom, a link-pivot in one arm, a link connecting this pivot with the scale-beam, means attached to the other arm for adjustably counterbalancing the weight of the link-pivot and link, lugs on the disk at opposite sides of the hub, and screws taking through the lugs against opposite arms of the link-carrier, all substantially as and for the purpose set forth.

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16. In a scale, the combination with a disk having a hub through whose axis the main pivot projects, a pendulum depending from the disk, a second disk removably connected with the first and through whose center said pivot projects, a hand supported by one disk at an angle to the pendulum, and means for adjustably counterbalancing the hand; of a link-carrier having an eye pivoted on said hub between the disks and a radial arm supporting the link-pivot, connections between this pivot and a moving part of the scale mechanism, means for counterbalancing said link-pivot and connections, and means for adjusting the position of the link-pivot relatively to the pendulum, all substantially as described.

17. In a scale, the combination with a disk having a hub through whose axis the main pivot projects, a pendulum depending from the disk, a hand supported by this disk at an angle to the pendulum, and means for adjustably counterbalancing the hand; of a link-carrier having an eye pivoted on said hub and a radial arm supporting a link-pivot, connections between this pivot and a moving part of the scale mechanism, means for counterbalancing said link-pivot and connections, and means for adjusting the position of the link-pivot relatively to the pendulum, all substantially as described.

In testimony whereof I have hereunto subscribed my signature this the 11th day of September, A. D. 1900.

ALLEN DE VILBISS, JR.

Witnesses:
N. L. COLLAMER,
F. R. FITTON.

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No. 12,138. REISSUED JULY 28, 1903.

A. DE VILBISS, Jr.

SCALE.

APPLICATION FILED MAR. 19, 1902.

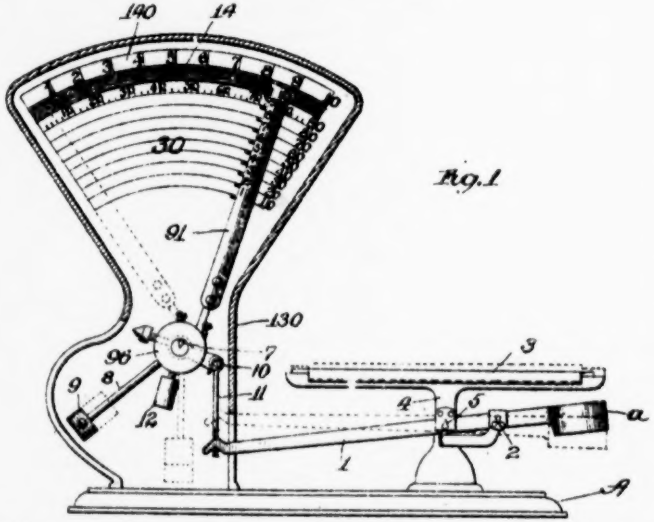

Fig. 1

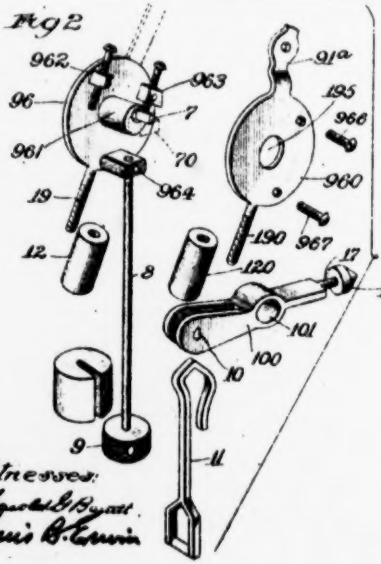

Fig 2

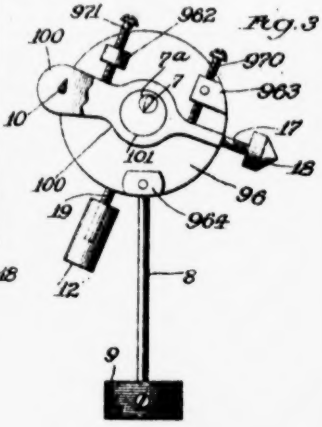

Fig. 3

Witnesses:
Louis B. Ennis

Inventor:
Allen de Vilbiss Jr.
By Rector Kilpatrick
his Atty.

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No. 12,138. Reissued July 28, 1903.

UNITED STATES PATENT OFFICE.

ALLEN DE VILBISS, JR., OF TOLEDO, OHIO, ASSIGNOR, BY MESNE ASSIGNMENTS, TO TOLEDO SCALE AND CASH REGISTER COMPANY, OF NEWARK, NEW JERSEY, A CORPORATION OF NEW JERSEY.

SCALE.

SPECIFICATION forming part of Reissued Letters Patent No. 12,138, dated July 28, 1903.

Original No. 674,646, dated May 21, 1901. Application for reissue filed March 13, 1903. Serial No. 98,111.

To all whom it may concern:

Be it known that I, ALLEN DE VILBISS, Jr., a citizen of the United States, residing at Toledo, in the county of Lucas and State of Ohio, have invented certain new and useful Improvements in Scales, of which the following is a description, reference being had to the accompanying drawings, forming part of this specification.

My invention relates to what are commonly known as "computing" or "price" scales, being scales which indicate not only the weight of the article or commodity being weighed, but also its value at any given price per pound (or other unit of weight) within the capacity of the scale, and has for its object certain improvements in scales of this character which will be hereinafter explained, and pointed out in the claims.

In the accompanying drawings, Figure 1 is a front elevation of the scale with the casing thereof in section to expose the parts within it. Fig. 2 is a perspective view of a group of unassembled parts, comprising the central disk, the pendulum, and the link-carrier and link, looking at the rear side of said parts; and Fig. 3, a rear elevation of some of said parts assembled together.

The same characters of reference are used to indicate identical parts in the several views.

The main scale-beam 1 is fulcrumed at 2 upon supports rising from the scale-base A and has mounted upon it the weighing pan or platform 3, which is provided on its under side with a standard 4, pivotally supported upon the beam at 5, as usual. Mounted upon the opposite or left-hand end of the scale-base A is a case or housing 130, whose upper portion is open at its front side to expose to view the computing-table 30, mounted within the housing.

Moving over and coöperating with the table 30 is an index-hand 91, pivotally supported at its lower end and having rigidly connected with it a weighted pendulum 8 9, which tends to hold the index-hand in its normal or zero position at the left-hand end of the computing-table 30, as indicated by the dotted lines in Fig. 1. The index-hand and pendulum are connected with the inner or left-hand end of the scale-beam 1, and whenever a load is placed upon the platform 3 the pendulum is swung to the left from vertical position and the index-hand to the right from normal position until such load is counterbalanced by the weight and leverage of the pendulum, whereupon the index-hand 91 comes to rest at a point upon the computing-table 30, indicating the weight and value of the article upon the scale-platform. To this end the index-hand 91 is provided with a series of numbers representing different prices per pound, and the computing-table 30 is graduated and numbered to indicate different totals of value at said several prices per pound. In the present instance the index-hand is provided with two series of rows of price units, of contrasting color or located upon surfaces of contrasting color, and the computing-table 30 is provided at its upper end with two rows of weight-numbers 140 and 14 of contrasting color, corresponding to the two rows of price-numbers upon the index-hand, and there is also provided a supplemental weight 90 for the pendulum 8; but these are features of my scale covered by patents heretofore granted me and which form no part of my present invention.

As thus far generally described, my present scale is substantially the same as those heretofore patented to me, and I will now proceed to describe the improvements constituting my present invention. The central pivot for the index-hand 91 and pendulum 8 consists of knife-edges 7, projecting from the opposite ends of a hub 961 and resting in bearings 70 upon the inner surfaces of the front and rear walls of the housing 130, as indicated in Fig. 2. The hub 961 projects from the center of a disk 96, which disk is also provided upon its inner face with two lugs 963 and 964, which afford means for attachment of a second disk 960, which is provided with a central hole 965, adapted to fit over the end of the hub 961 opposite the disk 960 and to be secured to the lugs 963 and 964 by screws 966 and 967, passed through holes in the disk 960 and entering said lugs. The disk 960 is provided with a projecting arm 91*, to which is secured the

index-hand 91, and at its side opposite said arm it is provided with a projecting threaded rod 190 to receive a counterbalancing-weight 120 for the index-hand. The disk 96 is also provided with a similar screw-rod 19 and nut 12, screwed thereon to aid the nut 120 in counterbalancing the index-hand. In the present instance the knife-edges 7, projecting from the opposite ends of the hub 961, are formed upon the ends of a round bar or rod 7*, Fig. 3, driven tightly into and extending entirely through the hub 961, its location being such that the active edges of the knife-edges 7 are coincident with the central axis of the hub 961. The pendulum 8 is secured at its upper end in the lug 964 and depends rigidly therefrom.

The link-carrier for the link which connects the inner end of the main scale-beam 1 with the index-hand and pendulum consists in the present instance of a lever 100, provided near its middle with a circular hole or eye 101, fitting the exterior of the hub 961, so that the lever may rock upon said hub as a fulcrum. The lever is engaged at opposite sides of its fulcrum by set-screws 970 and 971, the former of which is threaded through and carried by the lug 963 and the latter by a second lug 962. By retracting one of these screws and advancing the other the lever may be rocked upon its fulcrum and adjusted, as desired, for the purpose hereinafter explained. One end of the lever is bifurcated and carries a knife-edge 10, over which is hooked the upper end of the link 11, whose lower end is provided with a loop through which passes the inner end of the scale-beam 1. The opposite end of the lever is formed into a threaded rod 17 to receive a weighted nut 18 for counterbalancing the opposite end of the lever and the weight of the link 11.

In assembling the parts of a scale of this character it has been found difficult to properly counterbalance the weight of the index-hand and the weight of the link connecting the link-carrier with the scale-beam, because the adjustment of the counterbalancing-weight of one of these parts tends to destroy the counterbalance of the other, and I therefore adjust their counterbalances separately, as described below. Furthermore, after the index-hand and link-carrier have been properly counterbalanced, so that the hand stands accurately at the zero-line when the pendulum hangs vertical, it is often found on testing the scale that the hand does not accurately register with all of the graduations upon the computing-table. This is due to the fact that the extremes of movement of the link-pivot 10 are not in proper relation to a horizontal line drawn through the active edge of the main pivot 7. This link-pivot 10 normally stands above such horizontal line, and it is manifest that as it is drawn downward toward said line the leverage of the link-carrier will increase as the link-pivot, moving in the arc of a circle, approaches said line and that said leverage will gradually decrease as the link-pivot moves on downward in the arc of a circle away from said line. If the construction and adjustment of the parts are such, therefore, that the index-hand is to stand at middle position upon the computing-table when the position of the link-pivot coincides with a horizontal line through the active edge of the main pivot 7, it follows that the position of the link-pivot must be so adjusted that its extremes of movement will be equidistant from said horizontal line. If its path of movement is too high relatively to said line, the initial leverage of the link-carrier will be too small and its resistance to the pull of the link under the weight of the load upon the scale-platform be too great, while its leverage during the latter part of its full movement will be too great and its resistance to the pull of the link upon it insufficient. On the other hand, if the path of movement of the link-pivot is too low relatively to the horizontal line the initial leverage of the link-carrier will be too great and its resistance to the pull of the link insufficient, while its final leverage will be too small and its resistance to the pull of the link too great. The provision of the adjustable link-carrier described above enables me to readily adjust the position of the link-pivot so that its extremes of movement will be exactly equidistant from the horizontal line through the active edge of the main pivot, and this without destroying or affecting the counterbalance of either the index-hand or the link.

To this end the mode of operation of assembling the parts is as follows: The index-hand 91 having been previously secured to the arm 91* of the disk 960 and the pendulum 8 to the lug 964 of the disk 96 and the counterbalance-weights 12 and 120 applied to the screw-rods 19 and 190, the disk 960 is secured to the disk 96 by the screws 966 and 967, passing through the holes in the disk 960 and entering the lugs 963 and 964 on the disk 96, the end of the hub 961 passing through the central hole 965 on the disk 960, with its knife-edge 7 projecting beyond said disk in a position corresponding to the other knife-edge 7, projecting from the farther side of the disk 96. These connected parts are then inserted in the casing with the knife-edges 7 resting in the bearings 70 thereon. The nuts 12 and 120 are then adjusted until the index-hand 91 is perfectly counterbalanced and stands at the zero-line upon the computing-table when the pendulum hangs vertical and whether the removable weight 90 is used or not. The parts are then removed from the casing, the disk 960 disconnected from the disk 96, the link-carrier 100 slipped over the hub 961, the screws 970 and 971 tightened upon it, the disk 960 reattached, and the parts again inserted in the casing. The link 11 is then hung upon the link-pivot to connect the latter with the scale-beam 1, after which the

nut 18 is adjusted on the screw 17 to counterbalance the link and bring the index-hand back to the zero-line upon the computing-table, so that it will stand accurately over said line when the pendulum hangs vertical and whether the removable weight 90 is used or not. The scale is now ready to be tested to ascertain if the active edge of the index-hand properly registers with all of the lines or graduations on the computing-table, and this test is made by placing in succession a series of known weights upon the scale-platform and noting the positions to which they severally move the index-hand. If the initial movement of the index-hand—*i. e.*, its movement over the first or left-hand half of the computing-table—is excessive, it indicates that the normal position of the link-pivot 10 is too low, giving too great initial leverage to the link-carrier, while if the initial movement of the index-hand is not sufficient it indicates that the normal position of the link-pivot is too high, giving the link-carrier insufficient leverage during such initial movement. Excessive initial movement of the index-hand will be accompanied by deficient final movement—*i. e.*, over the second or right-hand half of the computing-table—while deficient initial movement will be accompanied by excessive final movement. To correct these inaccuracies, the link-carrier 100 is adjusted about the hub 961 to raise or lower the normal position of the link-pivot, the set-screw 970 being retracted and the screw 971 advanced to raise it and the screw 971 retracted and the screw 970 advanced to lower it, and by this adjustment of the position of the link-pivot 10 the index-hand may be caused to accurately register with all of the graduations upon the computing-table, and this adjustment is effected without in any manner affecting the previous counterbalance of the index-hand and the link by means of the nuts 12 and 120 and the nut 18, respectively.

The scale-beam and weighing platform or pan are counterbalanced independently of the mechanism within the casing by the weight *a* upon the outer end of said beam.

It is obvious that considerable change may be made in the details of construction above described without departing from my invention. Thus other means than the nuts 12 and 120 may be employed for counterbalancing the index-hand, or one of said nuts may be employed without the other. The link-carrier 100 may be adjusted around the hub 961 or about its pivotal support by other means than the set-screws 970 and 971, and the disk 960 may be entirely dispensed with and the index-hand be secured to the disk 96, as indicated by the dotted lines in Fig. 2, in which latter case the parts shown in Fig. 3 could be employed as there shown without the disk 960 and the parts carried by it.

Having thus described my invention, I claim—

1. In a scale, the combination, with the computing-table and the scale-beam, of a central hub having knife-edges projecting from its opposite ends and resting in supporting-bearings, an index-hand and pendulum connected to said hub, a link-carrier mounted upon said hub and adjustable around the same, and a link connecting said carrier with the scale-beam; substantially as described.

2. In a scale, the combination, with the computing-table and the scale-beam, of a central hub having knife-edges projecting from its opposite ends and resting in supporting-bearings, an index-hand and pendulum connected to said hub, a link-carrier mounted upon said hub and adjustable around the same, a link connecting said carrier with the scale-beam, means carried by the hub for counterbalancing the weight of the index-hand, and means upon the link-carrier for counterbalancing the weight of the link; substantially as described.

3. In a scale, the combination, with the computing-table and the scale-beam, of a central hub having knife-edges projecting from its opposite ends and resting in supporting-bearings, an index-hand and pendulum connected to said hub, a link-carrier in the form of a lever mounted upon said hub and adjustable around the same, and carrying a link-pivot at one end and a counterbalancing-weight at its opposite end, and a link connecting said link-pivot with the scale-beam; substantially as described.

4. In a scale, the combination, with the computing-table and the scale-beam, of a central hub supported in suitable bearings, a disk carried by said hub, an index-hand carried by the disk and coöperating with the computing-table, a pendulum depending rigidly from the disk, a link-carrier mounted upon the hub and adjustable around the same, and a link connecting said carrier with the scale-beam; substantially as described.

5. In a scale, the combination with the computing-table and the scale-beam, of a central hub supported in suitable bearings, a disk carried by said hub, an index-hand carried by the disk and coöperating with the computing-table, a pendulum depending rigidly from the disk, a link-carrier in the form of a lever mounted upon said hub and adjustable around the same, a pair of adjusting-screws carried by the disk and engaging the link-carrier upon opposite sides of the hub, and a link connecting the link-carrier with the scale-beam; substantially as described.

6. In a scale, the combination, with the computing-table and the scale-beam, of a central hub supported in suitable bearings, a disk carried by said hub, an index-hand carried by the disk and coöperating with the computing-table, a pendulum depending rigidly from the disk, a link-carrier mounted upon the hub and adjustable around the same, a link connecting said carrier with the scale-beam, means on the disk for counterbalancing the weight of the index-hand, and means on the

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link-carrier for counterbalancing the weight of the link; substantially as described.

7. In a scale, the combination, with the computing-table and scale-beam, of a central hub supported in suitable bearings, a disk carried by said hub, an index-hand carried by the disk and cooperating with the computing-table, a pendulum depending rigidly from the disk, a link-carrier in the form of a lever mounted upon said hub and adjustable around the same, and carrying a link-pivot at one end and a counterbalancing-weight at its opposite end, a pair of adjusting-screws carried by the disk and engaging the link-carrier upon opposite sides of the hub, a link connecting the link-carrier with the scale-beam; substantially as described.

8. In a scale, the combination, with the computing-table and the scale-beam, of a central hub supported in suitable bearings, an index-hand and pendulum rigidly connected with said hub, a link-pivot carried by said hub and adjustable concentrically thereto and relatively to the pendulum, and a link connecting said link-pivot with the scale-beam; substantially as described.

9. In a scale, the combination, with the computing-table and the scale-beam, of an oscillatory disk supported in suitable bearings, an index-hand carried by the disk and coöperating with the computing-table, a pendulum depending rigidly from the disk, a link-pivot moving with the disk and adjustable concentrically with its axis and relative to the pendulum, and a link connecting said link-pivot with the scale-beam; substantially as described.

10. In a scale, the combination, with the computing-table and the scale-beam, of a central hub supported in suitable bearings, a pair of disks mounted upon said hub at its opposite ends and turning therewith, an index-hand carried by one of the disks and cooperating with the computing-table, a pendulum depending rigidly from the disks, a link-carrier mounted upon the hub between the disks and adjustable around the hub, and a link connecting said link-carrier with the scale-beam; substantially as described.

11. In a scale, the combination, with the computing-table and the scale-beam, of a central hub supported in suitable bearings, a pair of disks mounted upon said hub at its opposite ends and turning therewith, an index-hand carried by one of the disks and cooperating with the computing-table, a pendulum depending rigidly from the disks, a link-carrier in the form of a lever mounted upon and adjustable around the hub between said disks, a pair of screws carried by one of the disks and engaging the link-carrier upon opposite sides of the hub, and a link connecting the link-carrier with the scale-beam; substantially as described.

12. In a scale, the combination, with the computing-table and the scale-beam, of a central hub supported in suitable bearings, a pair of disks mounted upon said hub at its opposite ends and turning therewith, an index-hand carried by one of the disks and cooperating with the computing-table, a pendulum depending rigidly from the disks, a link-carrier in the form of a lever mounted upon and adjustable around the hub between said disks, and carrying a link-pivot at one end and a counterbalancing-weight at its opposite end, and a link connecting said link-pivot with the scale-beam, substantially as described.

13. In a scale, the combination with the computing-table and the scale-beam, of a central hub supported in suitable bearings, a disk permanently secured to said hub at one end thereof, a removable disk fitting over the opposite end of the hub, means for securing the two disks together, an index-hand carried by one of the disks and coöperating with the computing-table, a pendulum depending rigidly from the disks, a link-carrier mounted upon and adjustable around the hub between said disks, and a link connecting the link-carrier with the scale-beam; substantially as described.

14. In a scale, the combination with the computing-table and the scale-beam, of a central hub supported in suitable bearings, a disk permanently secured to said hub at one end thereof, a removable disk fitting over the opposite end of the hub, inwardly-projecting lugs on one of said disks and screws passing through the other and entering said lugs, to secure the disks together, an index-hand carried by the disks and coöperating with the computing-table, a pendulum rigidly depending from the disks, a link-carrier mounted upon and adjustable around the hub between said disks, and a link connecting the link-carrier with the scale-beam; substantially as described.

15. In a scale, the combination, with the computing-table and the scale-beam, of a central hub, a round rod driven tightly into and extending through said hub and having its opposite ends projecting therefrom and formed into knife-edges, said knife-edges being coincident with the axis of the hub and resting in suitable supporting-bearings, an index-hand and pendulum rigidly connected with the hub, and a connection between the hub and scale-beam; substantially as described.

16. In a scale, the combination, with a table and a scale-beam, of an index coöperating with said table and a pendulum moving with said index, a link-carrier connected with said index and pendulum, means for adjusting said link-carrier concentrically with the pivotal support of the index and pendulum and relatively to the pendulum, and a link connecting said carrier with the scale-beam; substantially as described.

ALLEN DE VILBISS, JR.

Witnesses:
J. S. B. RICHARDSON,
W. G. SENSEMAN.

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No. 817,777. PATENTED APR. 17, 1906.

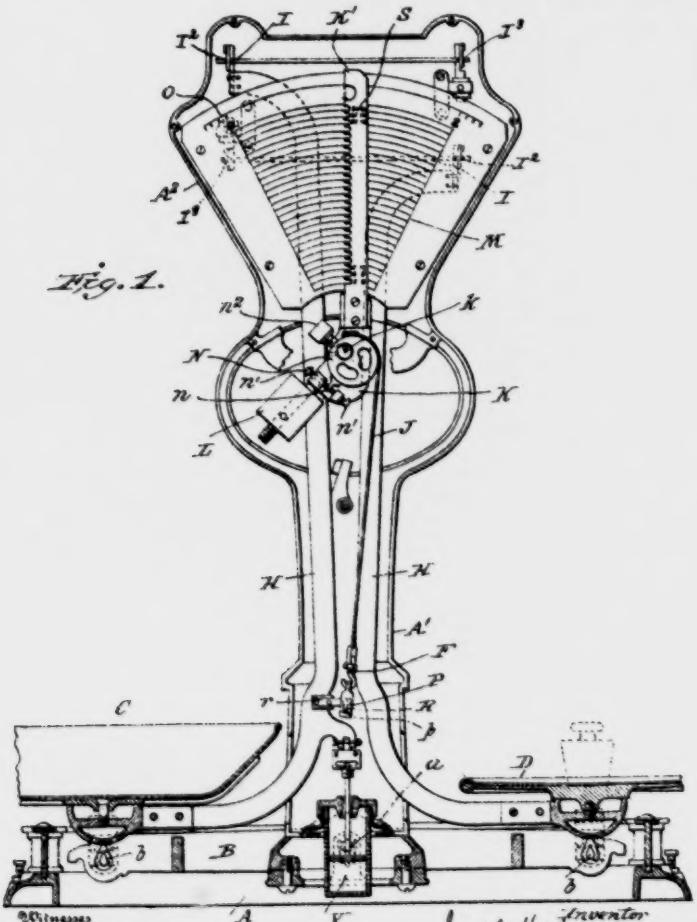
J. HOPKINSON.

PRICE SCALE.

APPLICATION FILED DEC. 15, 1905.

2 SHEETS—SHEET 1.

Fig. 1.



Witnesses
Edmund L. Yewell
Thomas Durant

Inventor
Joseph Hopkinson
By Church & Church
Attorneys

2946

No. 817,777. 1784 PATENTED APR. 17. 1906.

J. HOPKINSON.

PRICE SCALE.

APPLICATION FILED DEC 15, 1905.

2 SHEETS—SHEET 2

Fig. 2.

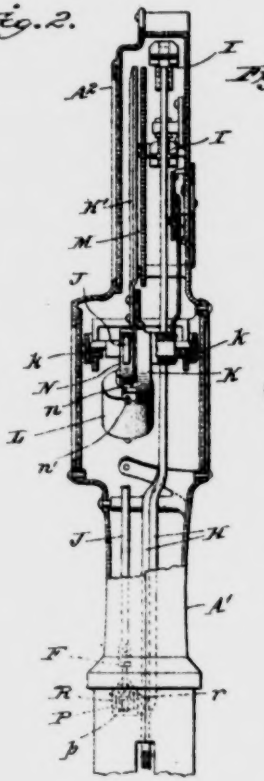
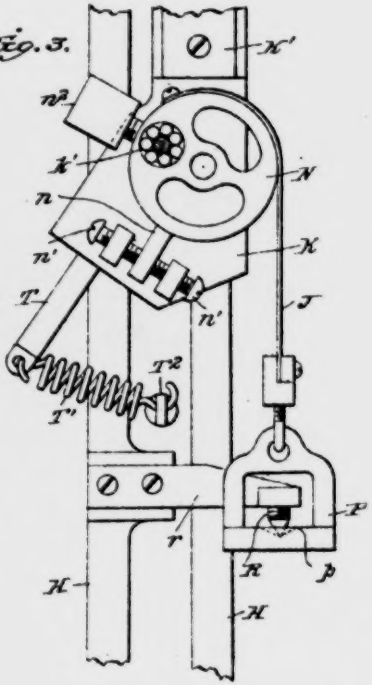


Fig. 3.



Witnesses
Edwin L. Yewell
Thomas Durant

Inventor
Joseph Hopkinson
By Munn & Munn
His Attorneys

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UNITED STATES PATENT OFFICE.

JOSEPH HOPKINSON, OF DAYTON, OHIO, ASSIGNOR TO THE COMPUTING SCALE COMPANY, OF DAYTON, OHIO, A CORPORATION OF OHIO.

PRICE-SCALE.

No. 817,777. Specification of Letters Patent. Patented April 17, 1906.

Application filed December 15, 1905. Serial No. 291,955.

To all whom it may concern.

Be it known that I, JOSEPH HOPKINSON, a resident of Dayton, in the county of Montgomery, State of Ohio, have invented certain new and useful Improvements in Price-Scales; and I do hereby declare the following to be a full, clear, and exact description of the same, reference being had to the accompanying drawings, forming part of this invention, and to the letters of reference marked thereon.

This invention relates to price-scales, and has for its object the production of a scale of the even-balance type, but having the capacity to indicate values of goods at different prices per unit.

A further object of the invention is to provide a scale of the type mentioned with an indicator movable angularly in a vertical plane to indicate both fractional values and fractional weights.

The invention contemplates the employment of an even-balance scale mechanism, preferably of the equal-arm type, with a goods receiver or pan on one side and the receiver for the counterweights on the opposite side of the fulcrum and a price and value indicating mechanism controlled and operated by the check devices employed for maintaining the pan in upright position, said price and value indicating mechanism embodying a segmental chart and an indicator movable angularly with relation thereto to indicate value at different rates, a differential counterbalance device being introduced to resist the movement in proportion to the weight of the article being weighed.

The invention consists generally in an even-balance scale combined with a differential counterbalancing mechanism operating to control an indicator for indicating values when the scale is overloaded or loaded beyond the balancing-point.

The invention further consists in certain novel details of construction and combinations and arrangements of parts, all as will be now described, and pointed out particularly in the appended claims.

Referring to the accompanying drawings, Figure 1 is a front elevation, partly broken away and partly in section, of a scale embodying the present improvements. Fig. 2 is a sectional elevation at right angles to Fig. 1. Fig. 3 is a detail view of a modified arrangement of the differential counterbalance.

The scale adopted for illustrating the present invention embodies a base A, having central bearings *a* for the equal-arm lever B, and a vertical standard A′, terminating at the top in a housing A^2 for the indicating and differential counterbalancing mechanisms. The equal-arm lever B carries at the ends the usual knife-edge pivots *b*, those at one end supporting the goods receiver or pan C and those at the opposite end supporting the counterweight-receiver D.

The usual check stems and links are omitted from the present scale, and the receivers are held in horizontal parallelism by check arms or stems H, connected rigidly with the receivers and extending vertically in the central standard, their upper ends being pivotally connected by check-links I with the said standard. The check-links should have a radius appoximately equal to the radius of the scale-lever B and extend in substantially horizontal planes in order to preserve the horizontal parallelism of the pan and weight-receiver without introducing appreciable frictional resistance or irregularity in the action of the scale. The check-links I extend in opposite directions from the arms H, each being pivotally connected at one end I^1 to the upper end of its arm and pivotally connected at the opposite end I^2 to the frame. The pivotal connections are similar in all respects to the pivotal connections used with check-links in scales as heretofore constructed and no detail description is necessary herein.

The scale as thus far described constitutes an even-balance scale of the equal-arm type, the counterpoise-weights on one arm being adapted to balance a load of equal weight on the other arm of the lever. In order now to make the scale a price-scale, an indicator and differential counterbalance mechanism is introduced, as follows:

An indicator-carrier K is journaled either on knife-edge pivots *k*, Fig. 1, or ball-bearings *k′*, Fig. 3, in the standard, and to one side of this carrier an adjustable counterweight L is secured to operate as a pendulum-weight in counterbalancing the load on the scale. The indicator-arm K′ projects at an angle from the carrier in position to register with graduations and value-indicating figures

on a segmental chart M in the upper end of the standard or the housing carried by the latter. On the front of the indicator-carrier is an angularly-adjustable eccentric N, to which one end of a flexible connection J is attached, the opposite end of said flexible connection supporting a stirrup P, having a conical bearing *p* for a pointed pivot R, carried by a bracket *r* on the upwardly-extending check-arm of the receiver. The eccentric N is mounted on the carrier so as to be adjustable angularly to adjust its leverage, and it is held in position by an arm *n*, clamped between adjusting-screws *n'* on the carrier K. Slack in the flexible connection may be taken up by an adjustable connection, as at F. To counterbalance the eccentric flexible connection and stirrup, the eccentric is provided with an adjustable weight n^2. Thus the scale may be said to have two systems of balanced members, the connection between the systems being formed by the pointed pivot and conical bearing.

In operation the counterbalance L is effective in counterbalancing load on the scale on one side only of the balancing-point, although, as shown, the indicator has a range of movement on both sides of the balancing-point, which latter is indicated by O, the movement on the underbalance side, however, being short, as it is designed simply to enable the indicator to act as a near-weight indicator to warn the salesman of the fact that the load being placed on the receiver is nearly sufficient to balance the scale. It will be noted that the indicator will operate in the manner described regardless of the weight of the removable counterpoise-weights on the weight-receiver. On the overbalance side the indicator has a wide range of movement in the scale illustrated equal to two pounds and the differential counterpoise operates to balance the load to the extent indicated by the chart and indicator, this counterbalancing being supplemental or in addition to the counterbalancing effect of the removable weights, if any of the latter be on the receiver. For all goods within the capacity of the chart and differential counterbalance the removable weights need not be used. In addition to the figures indicating the prices per unit the indicator may have columns of figures, such as at S, indicating the values of the removable counterpoise-weights at the various prices per unit. Thus a salesman knowing which removable weight is on the receiver has only to add its value at the desired rate to the value indicated on the chart at the same rate to arrive at the total value of the goods on the pan.

Obviously the differential counterbalance may be in the form of a spring instead of a pendulum-weight, and in Fig. 3 the carrier K is shown having an arm T, to the end of which a counterbalance-spring T' is secured, the opposite end of the spring being connected to a fixed stud or projection T^2 in the housing or standard. To check excessive vibration or bring the scale to rest quickly, a dash-pot V of ordinary construction may be employed.

While a particular type of even-balance scale is illustrated and described, it is obvious that the invention is not limited in its application to this particular type, and in the description where the term "receiver" or "weight-receiver" is used it will be understood that any ordinary means for supporting the load or goods to be weighed and the removable weights may be used, the said term being used in a broad sense to include any means for the purpose mentioned.

Having thus described my invention, what I claim as new, and desire to secure by Letters Patent, is—

1. In a price-scale, the combination with the lever pivoted intermediate its ends and the goods and removable counterweight-receivers carried by said lever, of the upwardly-extending check-arms connected with said receivers, links connected with said arms for maintaining the horizontal parallelism of the receivers and an indicator located above the receivers and actuated by one of said arms; substantially as described.

2. In a price-scale, the combination with the counterbalanced lever, the goods-receiver pivotally supported by the lever, the upwardly-extending check-arm connected with the goods-receiver and a link connected with the arm to maintain the goods-receiver in horizontal parallelism, of a pivoted indicator and differential counterbalance and a flexible connection between the same and upwardly-extending check-arm; substantially as described.

3. In a price-scale, the combination with the pivoted lever, a receiver for counterweights and a receiver for goods pivotally supported on said lever, of a check-arm connected to the goods-receiver and extending above the lever, a link for holding the goods-receiver in horizontal parallelism and a differential counterweight and indicator in operative engagement with the upwardly-extending check-arm; substantially as described.

4. In a scale, the combination with a lever, a receiver pivotally mounted on the lever and having an arm rigid therewith and extending above the lever, said parts constituting a balanced system in the scale, of a differential counterbalancing mechanism an indicator movable in unison with said differential counterbalance mechanism and a connection between said mechanism and the upwardly-extending arm on the receiver; substantially as described.

5. In a scale the combination with a lever, a receiver pivotally mounted on the lever, an arm connected to the receiver and extending above the lever, of a counterbalancing mech-

anism, and indicator connected therewith pivoted on a fixed axis above the lever, a connection between the arm and said counterbalancing mechanism and a segmental chart having graduations with which the indicator registers; substantially as described.

6. In a price-scale, the combination with a lever, a receiver pivotally supported thereby, and means for counterbalancing the same, of an upwardly-extending arm connected to the receiver, a check-link connected with said arm, a differential counterbalancing mechanism and indicator pivoted on a fixed axis above the lever, a connection between the said counterbalancing mechanism and upwardly-extending arm and a price-chart with which the indicator registers; substantially as described.

7. In a price-scale, the combination with the even-balance lever the receivers on opposite ends of said lever and the vertically-extending standard between the receivers, of arms rigidly connected with the receivers and extending vertically in the standard and check-links connecting the upper ends of said arms and standard; substantially as described.

8. In a price-scale, the combination with the even-balance lever, the receivers on opposite ends of said lever and the vertically-extending standard between the receivers, of arms rigidly connected with the receivers and extending vertically in the standard, check-links between the arms and standard, a counterbalancing and price-indicating mechanism in the upper end of the standard and a connection between the counterbalancing and indicating mechanisms and one of the arms; substantially as described.

9. In a scale, a balance-lever, a receiver pivoted thereon, a differentially-counterbalanced indicator pivotally supported independently of the lever, and operating connections independent of and separated from the lever between said indicator and receiver; substantially as described.

10. In a scale, a balance-lever, a receiver pivotally mounted thereon, a check-arm and link for holding the receivers in horizontal parallelism, a differentially-counterbalanced indicator pivotally supported independently of the lever and operating connections between the said arm and indicator; substantially as described.

11. In a scale, a balance-lever, receivers pivotally mounted on opposite ends thereof, check arms and links for holding the receivers in horizontal parallelism, an indicator and pendulum-counterweight pivotally supported independent of the lever and operating connections between one of said check-arms and the indicator and pendulum-counterweight; substantially as described.

12. The combination with an even-balance scale embodying receivers an equal-arm lever carrying the same and having a movement on both sides of the balancing-point and upwardly-extending check-arms connected with the receivers, of an indicator, a differential counterbalance movable therewith, a flexible connection intermediate the counterbalance and the check-arm connected with the goods-receiver whereby the differential counterbalance only balances goods placed on the receiver and a value-chart with which the indicator registers to indicate the value of goods balanced by the differential counterbalance; substantially as described.

JOSEPH HOPKINSON.

Witnesses:
H. M. WALSH,
S. L. MCKEE.

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No. 830,976. PATENTED SEPT. 11, 1906.

A. DE VILBISS, Jr.

COMPUTING SCALE.

APPLICATION FILED MAY 21, 1906.

Fig. 1.

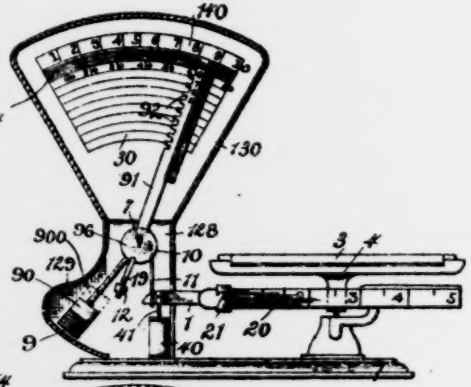


Fig. 4.

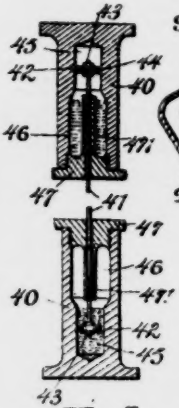


Fig. 2.

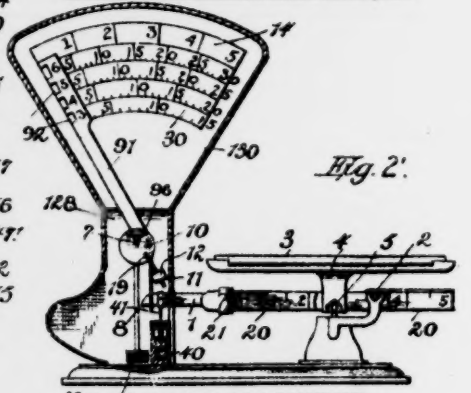
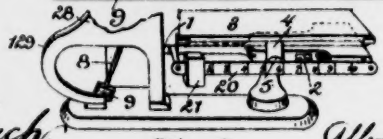


Fig. 3.

Fig. 5.



WITNESSES:

Geo. E. Fuch.

R. R. Pistorius

INVENTOR

Allen A. DeVilbiss Jr.,

By Collamer & Co.

ATTORNEYS

2951

1791

UNITED STATES PATENT OFFICE.

ALLEN DE VILBISS, JR., OF TOLEDO, OHIO, ASSIGNOR, BY MESNE ASSIGNMENTS, TO TOLEDO COMPUTING SCALE COMPANY, A CORPORATION OF NEW JERSEY.

COMPUTING-SCALE.

No. 830,976. Specification of Letters Patent. Patented Sept. 11, 1906.

Application filed May 21, 1900. Serial No. 17,411.

To all whom it may concern:

Be it known that I, ALLEN DE VILBISS, Jr., a citizen of the United States, and a resident of Toledo, Lucas county, State of Ohio, have invented certain new and useful Improvements in Computing-Scales, (Case N;) and my preferred manner of carrying out the invention is set forth in the following full, clear, and exact description, terminating with claims particularly specifying the novelty.

This invention relates to scales of that class which compute or indicate the total weight and total price by a hand standing normally at "0," but moved over the table by the load and coming to rest when the same is counterbalanced; and the objects of the same are to simplify the construction of such a scale; to render possible the use of a tare beam and weight in connection therewith, and to provide a liquid-brake for preventing undue vibration of the hand.

The present invention is an improvement in both these respects and in other details over my Patent (Case A) No. 621,297 and issued March 14, 1899, and it is adapted to the constructions shown in and yet is an improvement over my two companion applications, of which one (Case B) bears Serial No. 703,253 and was filed January 24, 1899, and the other (Case H) bears Serial No. 737,770 and was filed November 21, 1899, and allowed January 24, 1900, the principal improvement over both these cases consisting in omitting the counterbalance opposite the link-pivot and using an improved form of liquid-brake.

The following specification describes, briefly, the general construction and operation and at greater length the improvements and their advantages, all as illustrated in the accompanying drawings, wherein—

Figure 1 is a sectional view through one type of my scale, showing the hand as moved to eight pounds and the tare-beam complete. Fig. 2 is a similar sectional view through another type of my scale, showing the hand at "0." Figs. 3 and 4 are enlarged sectional views of the liquid-brake, the latter showing what occurs when the device is inverted, as in transportation, and also illustrating a slight modification of the piston. Fig. 5 is a perspective detail of the base, the fulcrum, the beam, and the lower portion of the casing.

1 is the main scale-beam, fulcrumed at 2 on a support which rises from the base, and 3 is a pan or platform having a standard 4, pivotally supported, as at 5, upon said beam. The base supports a casing consisting of an upright body portion 128 (preferably having a lateral extension 129) and provided with a housing 130, open at its front to expose a table 30, which is marked on its face with several rows of price-totals and near its upper edge with a single row of weight-totals 14 in Fig. 2 and with an additional row of weight-totals 140 in Fig. 1, the two rows when used being differently colored.

Mounted on knife-edge bearings 7 within the body portion of the casing is a disk 96, from which hangs rigidly a pendulum 8, having a fixed weight 9 at its lower end. In Fig. 1 this weight is colored to correspond with one of the rows of weight-totals, and there is an additional removable weight 90 of the other color, and there may be a second removable weight 900. Fixed to and rising from the disk obliquely to the pendulum is a hand or index 91, preferably having notches 92 in its active face, adjacent which are numerals to coact with the several lines of price-totals. In Fig. 1 there are two rows of these numerals opposite the notches, and the rows are colored to correspond with the two rows of weight-totals and the two weights on the pendulum. Projecting from the disk diametrically opposite the center of gravity of the hand is a screw 19, on which is an adjustable nut 12, forming a counterbalance for the weight which the hand possesses when it stands oblique. In the disk at a point between the screw and the hand is a knife-pivot 10, whose edge is normally above that of the central pivot 7 when the pendulum is vertical and over which hangs a link 11, that extends downward and is connected with the scale-beam.

20 is a tare-beam moving in unison with the main beam and preferably extending past both pivots 2 and 5. The tare-beam may have figures marked thereon, as shown, and 21 is the tare-weight.

40 is a cylinder (see Fig. 3) mounted by preference within the body portion of the casing about where shown, and 41 is a rod pivoted to the scale-beam and supporting a piston 42, which may be adjustable, as by

nuts 43, located above and below the same. Interiorly the cylinder at its lower end forms a dash-pot 45 of relatively smaller capacity and at its upper end a chamber 46 of relatively larger capacity. 47 is a cover closing the upper end of the cylinder, and hence of the chamber, and 471 is a nipple depending rigidly from this cover into the chamber and nearly to the bottom thereof, which is the top of the dash-pot. The cover and nipple are pierced with an opening, through which loosely passes the rod 41, and the piston 42 is either somewhat smaller in diameter than the dash-pot, as seen in Fig. 3, or it may have openings 44 through its body, as seen in Fig. 4. Either or any equivalent construction permits passage through or by the piston of oil or other liquid with which the dash-pot is evenly filled. When a scale containing this form of cylinder is inverted, the liquid runs out of the dash-pot into the chamber, whose capacity around the nipple is greater than that of the dash-pot. Hence the liquid then stands as seen in Fig. 4, and the necessity for packing around the rod is obviated.

The weight 12 counterbalances the hand 91, the pendulum with its weight or weights hangs normally vertical and swings outward into the extension 129 as the disk 96 turns on its pivot 7, and the other parts are so arranged and proportioned that when the tare-weight is at "0" they are exactly counterbalanced over the fulcrum 2. When a load is placed on the platform, the inner end of the beam 1 descends, the link 11 turns the disk, and the hand 91 moves over the table, while the pendulum rises and gains weight sufficient to balance the load. Meanwhile the piston descends in the liquid, and the density of the latter causes the hand to come quickly to rest. Had the load been lard, for instance, the grocer would have first placed a crock on the platform and immediately moved the tare-weight 21 until the hand returned to "0" from the point to which the weight of the crock had moved it. Thereafter the weighing of the commodity proceeds as above described.

In Fig. 2 the row 14 gives the total of weight, the figures on the hand are the price per pound, and the figure in the table 30, which is exposed through the notch 92 opposite the proper price per pound, is the total price. In Fig. 1 the same is true with the shaded row 14, the shaded figures on the hand and the fixed weight 9; but when the light weight 90 is added the hand will move to a less degree and the light row 140 and figures on the light portion of the hand must be used, the price-totals still being found in the proper notches. The additional weight 900 increases the capacity beyond the limits of total figures, as by doubling them, and when this weight is used those totals must be mentally doubled.

What is claimed as new is—

1. In a scale, the combination with the main beam having fulcrums mounted on a support, the pan or platform pivotally supported upon and carried by the main beam, and means for reducing vibration of said beam; of an auxiliary or tare beam connected and moving with the main beam and located beneath the pan or platform, a tare-weight thereon, and means connected with the main beam for automatically offsetting the weight of the load.

2. In a scale, the combination with the main beam having fulcrums mounted on a support, the pan or platform pivotally supported upon and carried by the main beam, and means for reducing vibration of said beam; of an auxiliary or tare beam connected and moving with the main beam and located beneath the pan or platform and extending past the main fulcrum, a tare-weight thereon, and means connected with the main beam for automatically offsetting the weight of the load.

3. In a scale, the combination with the computing-table, the main beam mounted on fulcrums carried by a support rising from the base, a supplemental or tare beam connected therewith, a tare-weight thereon, and a pan or platform carried by the main beam; of a hand and pendulum rigid with each other and mounted on a knife-edge pivot common to both, and connections between one beam and a point rigid with said hand normally above its pivot, whereby the hand is moved over the table to a degree corresponding with the depression of the pan, substantially as described.

4. In a scale, the combination with the computing-table, the main beam mounted on fulcrums carried by a support rising from the base, a supplemental or tare beam connected therewith, a tare-weight thereon, a pan or platform carried by the main beam, and means for offsetting the weight of the load; of a disk mounted on a supporting-pivot of knife-edges, a hand projecting rigidly from the disk and coacting with the table, a counterbalance for the hand projecting from the opposite side of the disk, and a link connecting one beam with a point on the disk normally above the supporting-pivot of said disk, substantially as described.

5. In a scale, the combination with the main beam having fulcrums mounted on a support rising from the base, a pan or platform carried by said beam, means for offsetting the weight of the load, an upright cylinder containing a dash-pot, and a nipple extending downward from the upper end thereof; of a rod connected with a moving part of the scale mechanism and passing loosely through the nipple, and a piston on the rod moving within the dash-pot, as and for the purpose set forth.

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6. In a scale, the combination with the main beam having fulcrums mounted on a support rising from the base, a pan or platform carried by said beam, means for offsetting the weight of the load, an upright cylinder containing a dash-pot, and a removable cover therefor having a nipple extending downward; of a rod connected with the scale-beam and passing loosely through the cover and nipple, and a piston on the rod moving within the dash-pot, as and for the purpose set forth.

7. In a scale, the combination with an upright cylinder containing at its lower end a dash-pot and at its upper end a chamber, and a removable cover therefor having a nipple extending downward into said chamber, which latter around said nipple is of no less capacity than said dash-pot; of a rod connected with a moving part of the scale mechanism and passing loosely through the nipple and cover, and a piston on the rod moving within the dash-pot, all substantially as described.

8. In a scale, the combination with an upright cylinder having at its upper end a chamber and at its lower end a dash-pot filled with liquid, and a cover for the cylinder having a nipple extending into the chamber, the capacity of the latter around said nipple being greater than that of the dash-pot; of a rod connected with a moving part of the scale mechanism and extending downward through said nipple, and a perforated piston adjustably mounted on the rod and standing within the dash-pot, substantially as described.

9. In a scale, the combination with an upright cylinder having at its upper end a chamber and at its lower end a dash-pot filled with liquid, and a cover for the cylinder having a nipple extending into the chamber, the capacity of the latter around said nipple being greater than that of the dash-pot; of a rod connected with a moving part of the scale mechanism and extending downward through said nipple, a piston mounted on the rod and standing within the dash-pot, and nuts on said rod above and below the piston for adjusting the latter, substantially as described.

In testimony whereof I have hereunto subscribed my signature this the 13th day of April, A. D. 1900.

ALLEN DE VILBISS. JR.

Witnesses:
L. W. RAKESTRAW.
JAMES R. SMITH.

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No. 839,736. PATENTED DEC. 25, 1906.

A. DE VILBISS, Jr.

COMPUTING SCALE.

APPLICATION FILED APR. 9, 1901. RENEWED MAY 31, 1904.

Fig. I.

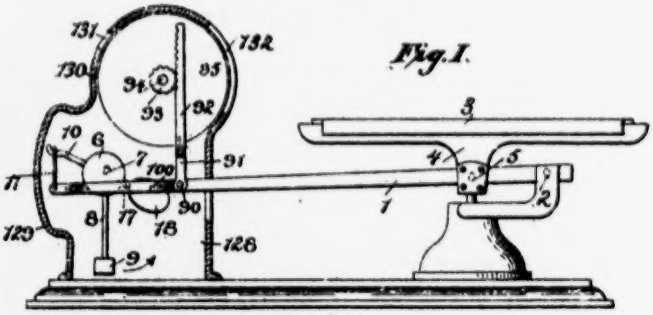


Fig. II.

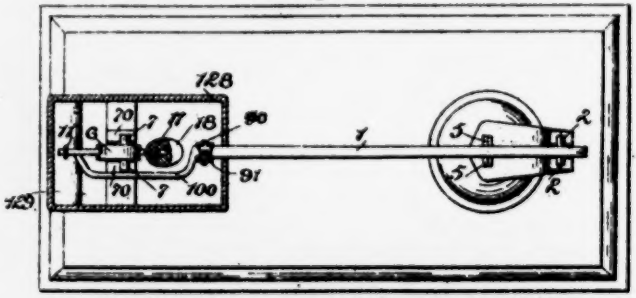
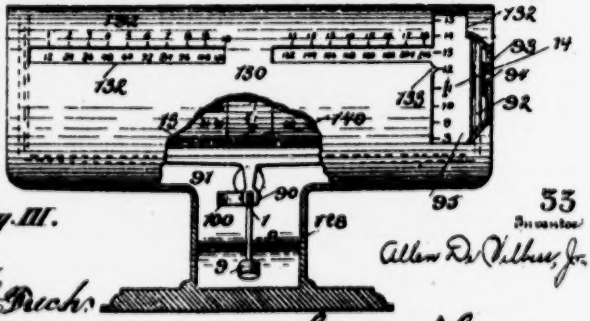


Fig. III.



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Witnesses:
Geo. E. Buchs.
C. R. Potter.

Inventor:
Allen De Vilbiss Jr.

By Williamson & Co. Attorneys.

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UNITED STATES PATENT OFFICE.

ALLEN DE VILBISS, JR., OF TOLEDO, OHIO, ASSIGNOR, BY MESNE ASSIGNMENTS, TO TOLEDO COMPUTING SCALE COMPANY, A CORPORATION OF NEW JERSEY.

COMPUTING-SCALE.

No. 839,736. Specification of Letters Patent. Patented Dec. 25, 1906.

Application filed April 9, 1901. Renewed May 31, 1904. Serial No. 210,406.

To all whom it may concern:

Be it known that I, ALLEN DE VILBISS, Jr., a citizen of the United States, and a resident of Toledo, Lucas county, State of Ohio, have invented certain new and useful Improvements in Computing-Scales, (Case No. 33;) and my preferred manner of carrying out the invention is set forth in the following full, clear, and exact description, terminating with claims particularly specifying the novelty.

This invention relates to scales of that class which compute or indicate the total weight and total price, preferably by means of a cylinder rotating on its axis within a casing which is provided with openings at suitable points to permit the dealer and the customer to see through them the results which it is desired shall be indicated; and the object of the present invention is to construct a scale of this type whose indicating mechanism, comprising the cylinder and the slotted casing, is combined with weighing mechanism substantially of the character covered by patents hitherto issued to me on this line of invention.

To this end the present invention consists in a construction of parts which shall adapt the indicating mechanism, above described, and the weighing mechanism to joint use in the simplest manner and whereby all necessary adjustments are permitted.

The following specification describes my preferred manner of carrying out the invention, whereas the claims embrace the salient points or combinations of elements, all as illustrated in the accompanying drawings, wherein—

Figure I is a side elevation of the weighing mechanism and a sectional view of the indicating mechanism. Fig. II is a plan view of this scale with the platform removed and the casing shown in section on a line through the main pivot. Fig. III is a longitudinal sectional view of the body portion of the casing with its drum-shaped housing partly broken away, so as to show the cylinder in elevation therein.

1 is the main scale-beam, fulcrumed at 2 on a support which rises from the base, and 3 is a pan or platform having a standard 4, pivotally supported, as at 5, upon said beam. The base supports a casing consisting of an upright body portion 128 (preferably having a rearward extension 129) and provided with a drum-shaped housing 130 at its top, which has openings 131 and 132 for a purpose to appear below.

6 is a disk having knife-edge bearings 7, supported upon blocks 70 within the body portion of the casing, and from this disk hangs rigidly a pendulum 8, having a weight 9 at its lower end. The scale-beam 1 is diverted from a straight line, as best seen at 100 in Fig. II, so that within the body portion of the casing it passes completely around the disk and the parts attached thereto and returns again to the line of its body, and at its extreme end a link 11 leads upwardly from this beam and is connected as by knife-edges, with a link-pivot 10, here shown as an arm projecting radially from the disk 6. From the latter, diametrically opposite the link-pivot, projects a counterbalance-arm 17, carrying a weight 18, the latter being sufficiently remote from the center 7 and of sufficient weight to counterbalance the weight of the link-pivot, the link, that end of the main beam, the pan or platform, and the connections hereinafter described by means of which the indicating mechanism is moved. As indicated in section in Fig. II, the arm 17 may be a screw and the weight 18 adjustable thereon, and I will hereinafter speak of this arm as a "screw."

In connection with a scale of the above type I preferably use indicating mechanism such as will now be described. Pivoted at 90 to the main beam is a fork 91, which extends upwardly and thence outwardly and then again upwardly into two arms 92, which are toothed, so that they constitute rack-bars. These engage the teeth of gears 93, mounted fast on the shaft 94 of the cylinder 95, rotatable within the housing 130; but it will be clear that any other suitable form of connections might be employed for converting an upward movement of the main beam 1 into a rotary movement of the cylinder. Herein where I speak of the devices shown as "connections" for this purpose I desire to be understood as including any equivalent devices for accomplishing this end.

The face of the cylinder is inscribed with a table 13, and in the present instance there are two bands around this cylinder, which

are inscribed with weight-totals. Here one (numbered 140) is at one end, while the other (numbered 140) is at the center of the length of the cylinder, and the latter has its figures inverted and is exhibited through the opening 131 to the customer at the rear end of the scale. The endmost row of weight-totals here moves under a pointer 133 adjacent the opening 132, which is in the front side of the housing 130 or toward the dealer. On the front side of the housing adjacent the dealer is a row of figures 192, giving the various prices per pound, and the table 13 on the cylinder carries the total prices, which are so arranged thereon as to come under their respective prices per pound and be observable through the opening 132 when the proper weight-total 14 comes opposite the pointer 133. I do not limit myself to this exact arrangement; but I prefer it in scales of this type.

The operation is as follows: The commodity being placed upon the pan or platform 3, the outer end of the scale-beam 1 descends and through the link 11 causes a rotation of the disk 6 on its pivots 7, drawing the link pivot-arm 10 downwardly from its normal position, which is above that of the main pivot 7. This swings the weight 9 to the right, as indicated by the arrow, and lifts the counterbalance-weight 18 and the fork 91. I repeat that said weight 18 is of sufficient size and so adjusted on the screw 17 as to exactly counterbalance all parts of the scale when the latter is at rest. The pendulum 9 rises in proportion to the weight of the commodity, and the rack-bars 92 turn the gears 93 and rotate the cylinder 95 on its axis 94, as will be clear. The row 140 of weight-totals passing under the opening 131 is exposed to the customer, who may see that he obtains full weight, and meanwhile the row 14 of weight-totals passes under the pointer 133 and gives the same information to the dealer. With the present construction, however, that longitudinal row on the table 13 which corresponds to the total weight comes opposite the opening 132 on the dealer's side of the housing, and under the proper figure in the row 192 indicating the price per pound he can quickly see the total price. It is obvious that this arrangement of openings could be modified to some extent without departing from the spirit of my invention. The parts are of the desired sizes, shapes, proportions, and materials, and the invention may be used with or without other details which form no feature of the present case.

What is claimed as new is—

1. In computing-scales, the combination of a supporting-base, a scale-beam pivoted at or near one of its ends on said base, a platform pivotally mounted upon said beam inwardly beyond the latter's pivot, a substantially cylindrical casing mounted at an elevated position in rear of the platform over the rear end of the scale-beam and transverse thereto, said cylindrical casing being apertured in the side toward said platform above the plane of the top of the latter, a drum journaled in said casing with its axis transverse the beam and the latter centrally located with reference to said axis, said drum bearing weight and price inscriptions to show through said apertures of the casing, a gear-wheel secured to the drum, a rack-bar meshing with said gear-wheel and pivotally connected with the scale-beam where the latter extends below the drum, and load-counterbalancing means connected with the scale-beam in rear of the pivotal support thereon for the platform.

2. In computing-scales the combination of a supporting-base, a scale-beam pivoted at or near one of its ends on said base, a platform pivotally mounted upon said beam inwardly beyond the latter's pivot, a substantially cylindrical casing mounted at an elevated position in rear of the platform over the rear end of the scale-beam and transverse thereto, said cylindrical casing being apertured in the side toward said platform above the plane of the top of the latter, a drum journaled in said casing with its axis transverse the beam and the latter centrally located with reference to said axis, said drum bearing weight and price inscriptions to show through said apertures of the casing, gear-wheels secured to opposite ends of the drum, rack-bars meshing with said gear-wheels respectively and pivotally connected with the scale-beam where the latter extends below the drum, and load-counterbalancing means connected with the scale-beam in rear of the pivotal support thereon for the platform.

3. In computing-scales, the combination of a suitable supporting-base, a transversely-extending slotted cylindrical casing supported in elevated position at the rear part of said base, a rotary indicating drum or cylinder within said casing, a scale beam or lever fulcrumed at or near one of its ends on the forward part of the supporting-base and extending rearwardly at right angles to the axis of the said drum or cylinder to a point below the middle of the latter, a gear-wheel carried by said cylinder, a rack-bar engaging said gear-wheel, means pivotally connecting the rack-bar with the scale-beam where the latter extends below the cylinder, a platform pivotally supported upon said scale-beam in rear of the latter's fulcrum and centrally located in front of the indicating-cylinder below the slots in the latter's casing, and means operating automatically to counterbalance that portion of the scale-beam extending in rear of its fulcrum and the parts connected therewith which tend to depress it thus normally maintaining the indicating-cylinder at zero position, with provisions for a varying

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automatic augmentation to counterbalance varying loads placed upon the platform and to correspondingly limit the resultant rotation of the cylinder so that the correct indication of weight and price may be exhibited through the slots of the casing.

4. In computing-scales, the combination of a suitable supporting-base, a transversely-extending slotted cylindrical casing supported in elevated position at the rear part of said base, a rotary indicating drum or cylinder within said casing, a scale beam or lever fulcrumed at or near one of its ends on the forward part of the supporting-base and extending rearwardly at right angles to the axis of the said drum or cylinder to a point below the middle of the latter, gear-wheels carried by the cylinder at its opposite ends, rack-bars connected together to operate in unison and engaging said gear-wheels respectively, means pivotally connecting the rack-bars with the scale-beam where the latter extends below the cylinder, a platform pivotally supported upon said scale-beam in rear of the latter's fulcrum and centrally located in front of the indicating-cylinder below the slots in the latter's casing, and means operating automatically to counterbalance that portion of the scale-beam extending in rear of its fulcrum and the parts connected therewith which tend to depress it, thus normally maintaining the indicating-cylinder at zero position, with provisions for a varying automatic augmentation to counterbalance varying loads placed upon the platform and to correspondingly limit the resultant rotation of the cylinder so that the correct indication of weight and price may be exhibited through the slots of the casing.

5. In a scale, the combination with indicating mechanism of rotary character, the pan, the main beam, and connections between said beam and the indicating mechanism for turning the latter proportionately to the movements of the former; of a disk, a main pivot therefor, a pendulum carried thereby, a link pivot-arm supported by and projecting beyond the periphery of the disk, a link connecting this pivot-arm with the beam, and a counterbalance-weight projecting beyond the periphery of the disk opposite the link pivot-arm and of a size adapted to counterbalance all movable parts which are not supported on their own pivots.

6. In a scale, the combination with indicating mechanism of rotary character, the main beam, and connections between said beam and the indicating mechanism for turning the latter by the former; of a main pivot, a pendulum hanging rigidly therefrom, a rigid arm passing through said pivot at an oblique angle to the pendulum and having a link pivot-arm at one end and a screw at the other, a link connecting the link pivot-arm and the main beam, and a counterbalance-weight adjustable on said screw and of a size adapted to counterbalance all movable parts which are not supported on their own pivots.

7. In a scale, the combination with indicating mechanism of rotary character, weighing mechanism including the main beam, and connections between said beam and the indicating mechanism for turning the latter by the descent of one end of the former; of a main pivot, a pendulum hanging rigidly therefrom, a link pivot-arm projecting from the main pivot and standing normally above the latter, a link connecting the link pivot-arm with the descending end of the main beam, and a single adjustable weight carried by the main pivot opposite said link pivot-arm for counterbalancing all movable parts which are not supported on their own pivots.

8. In a scale, the combination with indicating mechanism of a rotary character mounted on an axis, a gear thereon, the weighing mechanism including a main beam diverted from the line of its straight body, a pivot standing within the divergent portion of the beam, a pendulum hanging therefrom, and connections at one side of said pivot between the pendulum and the beam; of a rack-bar pivoted to the beam at the other side of said pivot with its teeth engaging the gear of the indicating mechanism, and means for counterbalancing all movable parts which are not supported on their own pivots.

9. In a scale, the combination with indicating mechanism of a rotary character mounted on an axis, a gear thereon, the weighing mechanism including a main beam diverted from the line of its straight body, a pivoted disk standing within the divergent portion of the beam, a pendulum hanging from the disk, an arm projecting from the disk, and connections between the latter and the beam; of a rack-bar pivoted to the beam independent of said connections and having its teeth engaging the gear of the indicating mechanism, and means for counterbalancing all movable parts which are not supported on their own pivots.

10. In a scale, the combination with the casing having a plurality of openings, a cylinder journaled on a horizontal axis therein and inscribed on its face with figures to move under said openings, certain of the figures being inverted with respect to the remainder in order to permit their reading from the opposite side of the casing, the weighing mechanism including a main beam, and a fork whose stem is pivoted to the latter and whose arms are connected with the hubs of the cylinder so as to rotate it as the beam moves; of a pendulum mounted on a main pivot, a link pivot-arm projecting from the latter, a link connecting the link pivot-arm with the main beam, and means for counterbalancing the weight of all movable parts which are not supported on their own pivots.

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11. In a scale, the combination with the casing having openings, a cylinder journaled on a horizontal axis therein and inscribed on its face with figures to move under said openings, the weighing mechanism including a main beam diverted from the line of its straight body, and a fork whose stem is pivoted to the main beam and whose arms are connected with the hubs of the cylinder so as to rotate it as the beam moves; of a pendulum mounted on a main pivot, a link pivot-arm projecting from the latter, a link connecting the link pivot-arm with the main beam, a counterbalance-arm projecting from the main pivot opposite the link pivot-arm, and a counterbalance-weight thereon of a size to offset the weight of the link pivot-arm, the link, the main beam, the platform, the fork, and its connections, all substantially as described.

In testimony whereof I have hereunto subscribed my signature this 1st day of April, A. D. 1901.

ALLEN DE VILBISS, Jr.

Witnesses:
EMMA EIBEN,
MAE TUTTLE.

2959

1802

1,068,616.

L. C. WETZEL.

WEIGHING AND COMPUTING SCALE.

APPLICATION FILED JULY 12, 1909.

Patented July 29, 1913.

5 SHEETS-SHEET 1.

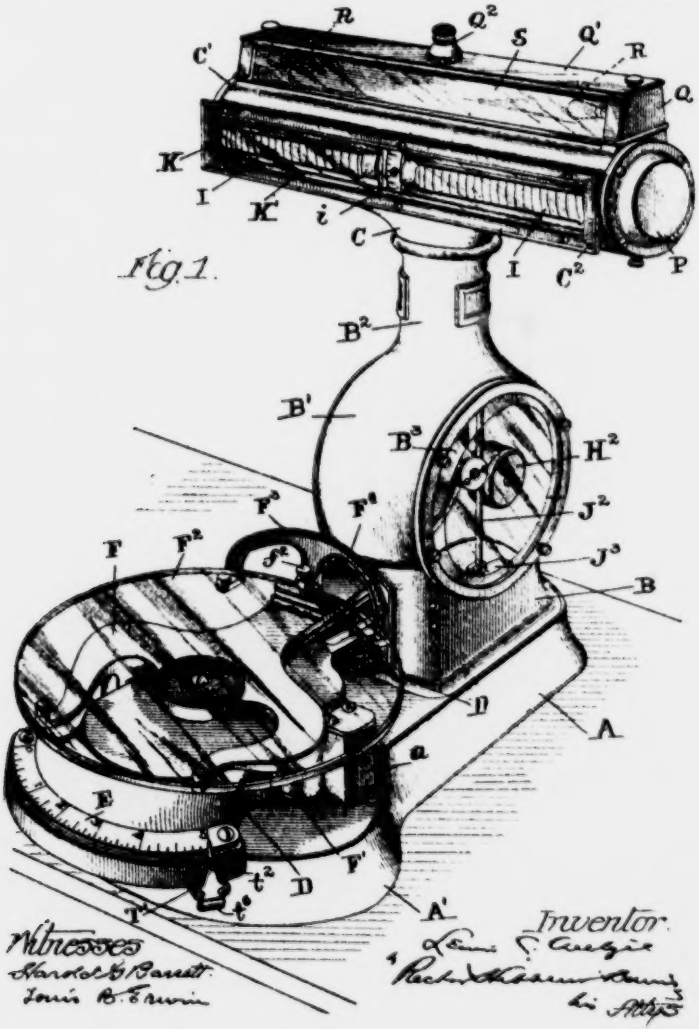

Fig. 1.

Witnesses
Harold B. Barrett
Louis B. Erwin

Inventor
Louis C. Wetzel
by Richardson, Barrett & Burns
his Attys

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1,068,616.

L. C. WETZEL.

WEIGHING AND COMPUTING SCALE.

APPLICATION FILED JULY 12, 1909.

Patented July 29, 1913.

2 SHEETS—SHEET 2.

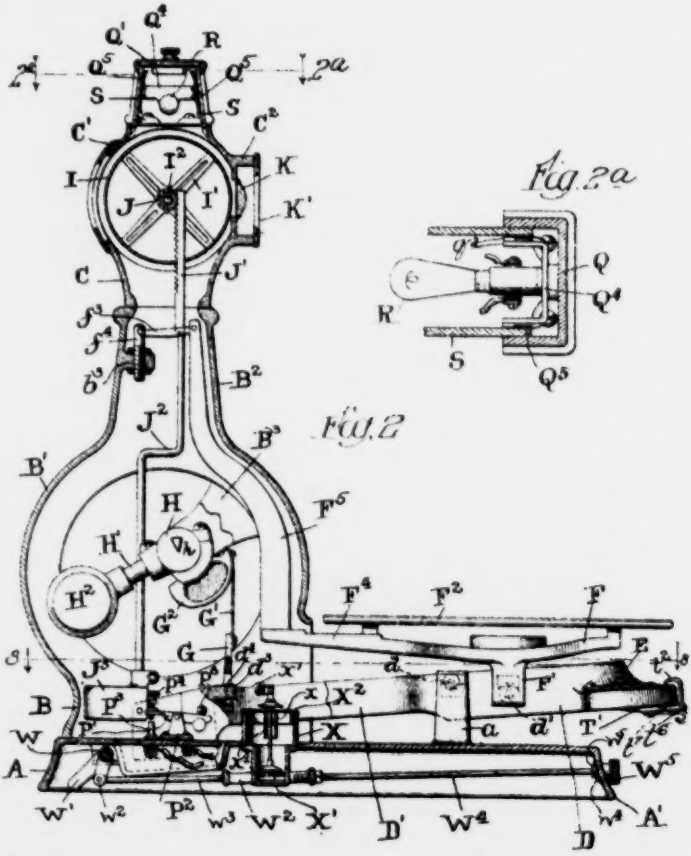

Fig. 2a

Witnesses:
Harold G. Barrett
Louis B. Erwin

Inventor:
Louis C. Wetzel
by Richardson & Richardson
his Attys.

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1,068,616.

L. C. WETZEL.

WEIGHING AND COMPUTING SCALE.

APPLICATION FILED JULY 12, 1909.

Patented July 29, 1913.

3 SHEETS-SHEET 3.

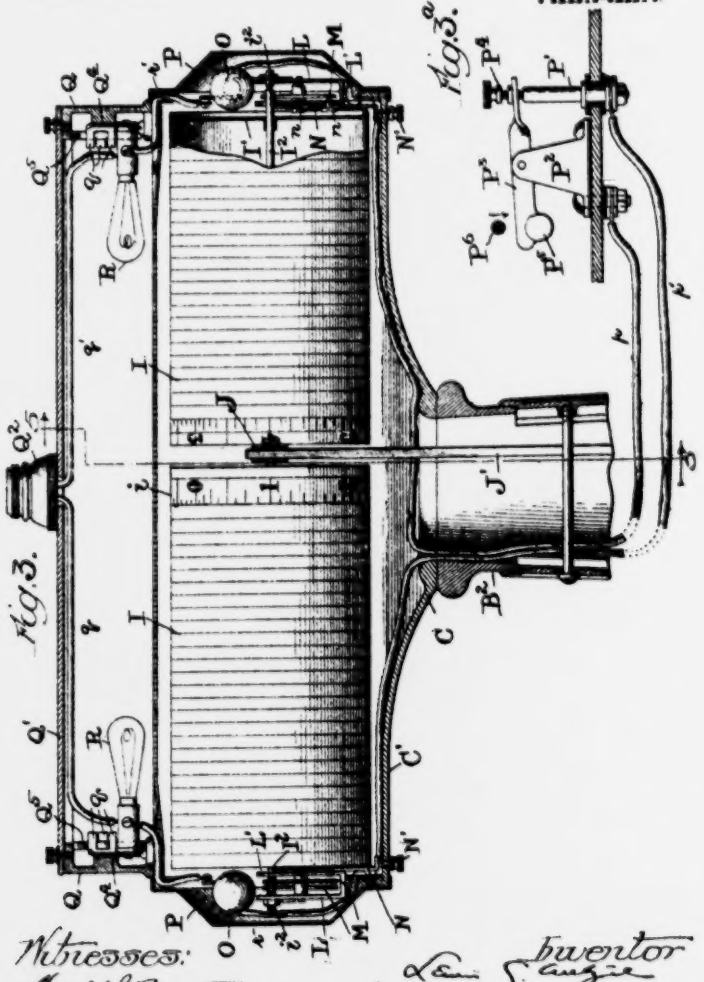

Fig. 3.

Fig. 3a.

Witnesses:

Harold B. Barrett

Louis B. Erwin

Inventor

Louis C. Wetzel

by Robb & Adams, Sons

his Attys

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1,068,616.

L. C. WETZEL.

WEIGHING AND COMPUTING SCALE.

APPLICATION FILED JULY 13, 1909.

Patented July 29, 1913.

6 SHEETS—SHEET 4.

Fig. 5.

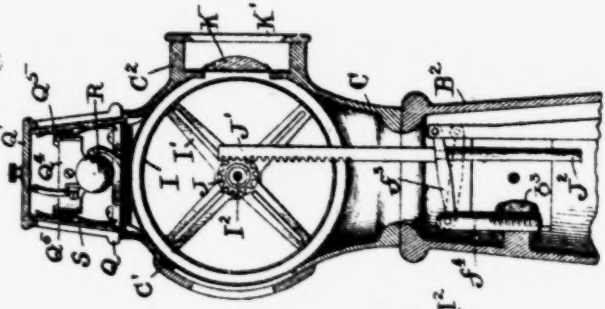


Fig. 6.

Fig. 7.

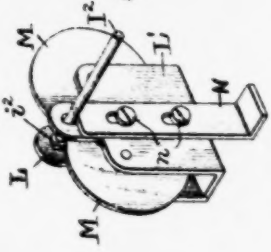
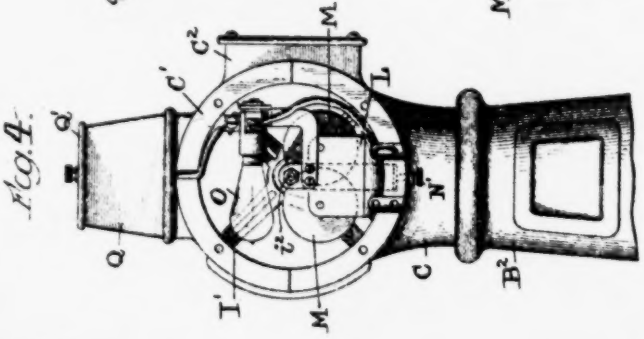


Fig. 4.



Witnesses:
Harold S. Barrett
Louis B. Erwin

Inventor:
Louis C. Wetzel
by Richard Haseltine Bacon
his Attys

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L. C. WETZEL.

WEIGHING AND COMPUTING SCALE.

APPLICATION FILED JULY 13, 1909.

1,068,616.

Patented July 29, 1913.

5 SHEETS—SHEET 5.

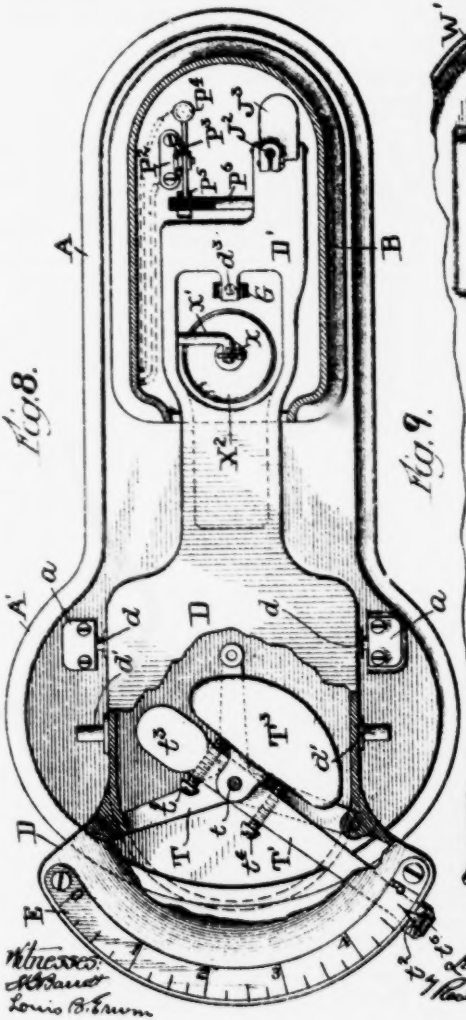

Fig. 8.

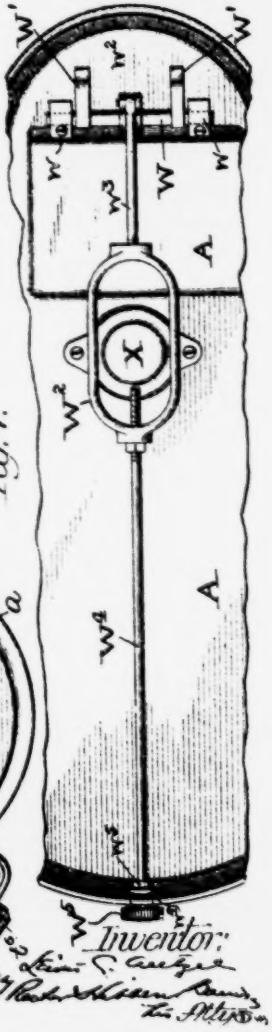

Fig. 9.

Witnesses:
H. C. Bauer
Louis B. Brown

Inventor:
Lewis C. Wetzel
by Robb & Allen Attys

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1811

UNITED STATES PATENT OFFICE.

LEWIS CALVIN WETZEL, OF TOLEDO, OHIO, ASSIGNOR TO TOLEDO SCALE COMPANY, OF TOLEDO, OHIO, A CORPORATION OF NEW JERSEY.

WEIGHING AND COMPUTING SCALE.

1,068,616. Specification of Letters Patent. Patented July 29, 1913.

Application filed July 13, 1909. Serial No. 507,102.

To all whom it may concern:

Be it known that I, LEWIS C. WETZEL, residing at Toledo, in the county of Lucas and State of Ohio, have invented certain new and useful Improvements in Weighing and Computing Scales, of which the following is a specification.

The principal object of the present invention is to provide improved means in a weighing and computing scale for automatically illuminating the chart or table which bears weight and price numerals and marks, whenever goods are placed on the scale; also providing for the flashing of advertising matter or the like arranged as an adjunct to the scale.

In the accompanying drawings Figure 1 shows the complete scale in perspective; Fig. 2 is a vertical longitudinal section; Fig. 2^a is a detail section on line 2^a—2^a of Fig. 2; Fig. 3 is a cross section of the upper part of the scale; Fig. 3^a a continuation of Fig. 3; Fig. 4 an end elevation of this upper part of the scale with a cap removed; Fig. 5 is a vertical section of this upper part of the scale; Fig. 6 is a detail perspective; Fig. 7 is a perspective of certain bearings; Fig. 8 is a horizontal section on line 8—8 of Fig. 2 with some parts broken away; and Fig. 9 is a fragmentary bottom plan view of the scale.

The scale rests upon a hollow cast iron base comprising an elongated, rather narrow, portion A and a widened oval portion A′. The latter may be considered the front portion of the base because it is over this portion that the goods receiver is located. There is erected upon the rear portion of the base a hollow cast iron column comprising a lower part B substantially rectangular in cross section, a middle portion B′ of partly spherical form, and a reduced tubular upper portion B^2. The latter supports the short stem C of a transverse cylindrical housing C′ within which the indicator is mounted. This arrangement of a supporting framework provides for the scale resting upon a counter without occupying a great deal of lateral space thereon and at the same time provides for ample capacity in the matter of indicating weights and values, as the cylindrical casing can be made as long as desired without taking counter space.

Upon the forward widened portion of the base there is a pair of standards *a* which contain bearing blocks as indicated by dotted lines in Fig. 2 for fulcruming the main beam or lever. The latter comprises a wide forward portion D in the form of a hollow inverted casting from the sides of which project knife edge bearings *d* to rest upon said blocks in the standards *a*. This wide portion of the beam extends forward so as to overhang the oval portion A′ of the supporting base and the beam broadens as it so extends, taking on a somewhat fan-like shape as clearly shown in Fig. 1, there being applied to its upper side an arc-shaped tare scale plate E for use in connection with devices hereinafter described for taking out tare or increasing the capacity of the scales. Said wide portion of the beam has another pair of laterally projecting knife edge bearings *d*′ located forward of the projections *d* and reversed with relation thereto so as to provide for bearing blocks *f* resting thereon, such blocks being mounted in legs F′ of a spider F supporting a platter F^2 which may be held in place by a set screw f^2 entered through an ear of a bracket F^3 rising from the spider F. The latter has an arm F^4 extending rearwardly through an opening in the lower portion B of the supporting column heretofore described, said arm F^4 having on the interior of such column an upward extension F^5, Fig. 2, which at its upper extremity is pivotally connected to a link f^3, the latter pivoted to a post f^4 adjustably mounted in an interior lug b^3 of the column through screw threads and nuts as illustrated in Fig. 2.

The last described arrangement provides for maintaining the level of the disk or platter F^2 during vibration of the beam, the link f^3 corresponding in length with the distance between the fulcrum of the beam and the fulcrum of the platter support. The location of the link at an elevated point in the column, instead of below the platter support and within the hollow base, has the advantage of permitting the platter to occupy a lower position.

The portion of the main beam or lever extending inwardly beyond the fulcrum is in the form of a somewhat weighty arm D′ which extends through the front opening in the aforesaid column and has therein a lug d^3 with a point bearing d^4 on its under side engaging a stirrup G extended from the lower end of a flexible steel strap G′, the

latter secured to an eccentric disk G^2 suitably fulcrumed in a bracket B^3 within the central portion of the column or housing. Said disk is secured, preferably with means of adjustment, to a rock shaft H having knife edge bearings A resting in suitable blocks supported by the bracket B^3. There projects from said rock shaft a short rod or stem H' carrying a weight H^2, the two constituting a pendulum which is normally elevated as shown in Fig. 2, the weight of the inner arm of the scale beam or lever being sufficient to so elevate the pendulum besides normally elevating the goods receiver. It will be obvious that weight placed upon the platter F^3 will act in opposition to the weighted inner arm of the beam and, the parts being normally in equilibrium, the effect of applying weight upon said platter will be to elevate the inner arm of the beam, thereby permitting the pendulum to drop, but as the latter loses leverage in dropping, the parts again assume equilibrium with the inner end of the beam more or less elevated and the pendulum more or less pendent, according to the amount of weight placed upon the platter.

The indicating mechanism here shown is in the form of a pair of drums or cylinders I journaled in the cylindrical casing C before mentioned. Each of these drums or cylinders comprises a light translucent shell and spiders I' secured to a central arbor I^2. The latter carries fixed to it at a point between the two cylinders, as shown in Fig. 3, a small gear pinion J which is engaged by a rack J' in the form of a bar surmounting the upper end of a bent rod J^3, the latter at its lower end secured to a weight J^4 pivotally mounted on the inner extremity of the main beam or lever. Said weight preponderates to the rear of the pivotal mounting thereof so as to yieldingly hold the rack J' in mesh with the pinion J, thus insuring close engagement without binding.

It will be obvious that the above described indicating construction provides for turning of the drums or cylinders by vibration of the main beam or lever. One of the drums or cylinders—the left-hand one in Fig. 3—is here shown as enough longer than the right-hand drum or cylinder to provide a peripheral portion located centrally of the scale and on this peripheral portion of said left-hand drum or cylinder is inscribed a weight scale i adapted to show at all times through an opening in the front of the casing. The adjacent peripheral portion of the other drum is similarly inscribed, though with the numerals reversely arranged, and shows through an opening in the back of the casing. The balance of the peripheral surface of each drum is inscribed with rows of computation numerals and graduations and the casing C is open all the way across at the front to expose the cylinders in a limited circumferential area from end to end. Preferably magnifying glasses K, Fig. 2, extend across the casing so as to magnify the exposed series of computation numerals, such numerals being somewhat small owing to the desirability of finely graduating the cylinders to provide a great range of values. The cylinder C at the front is made with a box-like forward projection C^2 extending from side to side, closed at the front by a glass K', this arrangement giving the indicating part of the scales a finished appearance and suitably protecting the interior mechanism while affording an unobstructed view of the exposed portions of the drums or cylinders. Ranging along the upper or lower or both sides of the longitudinal openings through which the computations are visible will be scales of price numerals located to correspond with the circumferential series of graduations and numerals on the drums. The shaft or arbor I^2 to which said indicating drums are secured is pointed at each end to engage thrust bearings in the form of screws i^2 supported in the outer uprights L of brackets secured to the casing, all as shown in Fig. 3. The shaft rests at each end in the bite of disks M loosely mounted between the outer and inner uprights L and L' of the said brackets. To guard against damage to the shaft in shipment provision is made for holding it out of contact with said disks. Thus upon the inner side of each of the bracket uprights L' there is adjustably mounted a plate N whose upper end extends under the shaft or arbor and whose lower end is flanged for the engagement therewith of a screw N' entered through the underside of the casing. The plates are slotted to embrace guiding screws n secured in the bracket and it will be obvious that by turning up the screws N' the plates can be raised so as to lift the shaft from contact with the disks M. When the scale is set up of course the screws will be withdrawn so that the shaft will rest properly in the bites of the disks.

Coming now to the matter of illumination, to which the invention chiefly relates, the aforesaid brackets which support the bearings for the cylinder arbor also support incandescent electric lamps O, one at each end and located to shine into the open ends of the cylinders or drums as clearly illustrated in Figs. 3 and 4. Suitable caps I^3 applied to the ends of the cylindrical casing cover the cylinder journals and said lamps. Current is automatically turned on by the operation of the scales and to this end the lamps are wired to posts P' and P^2 on the base of the scales as shown in Figs. 2 and 3^a, the connecting wires between the said posts and the said lamps being designated

by reference letters p, p'. In the post P^2 there is pivotally mounted a switch lever P^3 carrying on one side of its pivot a contact screw P^4 and on the opposite side of its pivot a weight P^5, the idea being to have the arm on the contact side barely overbalance the weighted arm so that the amount of force necessary to break the connection will be negligible. The scale beam or lever carries at its inner end a stud or pin P^6 of suitable insulating material or suitably insulated, which stud or pin extends over the weighted end of said lever P^3 and normally engages the same as shown in Fig. 2, separating the screw P^4 from contact with the post P'. Any weight placed upon the platter F^2 will cause sufficient movement of the beam to raise the pin P^6 as shown in Fig. 3^a and permit the contact to be made, thereby causing illumination of the translucent drums, which will continue until the article or goods being weighed and valued are removed. This of course enhances the clearness of the indications of weight and values, making them easier to read and mistakes less likely to occur, besides permitting the use of smaller and more closely assembled markings on the chart and hence greater capacity in a given area for computing.

On top of the housing or casing for the said drums or cylinders there is a casing comprising end pieces Q and a detachable top plate Q'. The latter carries a socket Q^2 for an electrical connection, said socket being connected by wires q, q' to lamps R carried by the end pieces Q, said lamps being wired in series or in multiple with the lamps O. Wires r, r' are shown in the present instance connecting said lamps R in series with lamps O. Secured to the end pieces Q are brackets Q^4 having inwardly pointed staggered fingers q^2 for holding spring clips Q^5. The end pieces Q are suitably formed to receive removable glass plates S which will be held in place by said spring clips shown in Fig. 5. These plates may be used to display advertising matter which will be momentarily illuminated whenever the scale is operated by reason of the closing of the circuit through the lamps R. The manner of mounting the plates as above described provides for interchanging plates to vary the display at will.

Referring next to devices for taking out tare or increasing the weighing capacity of the scale, there is secured on the under side of the widened portion of the scale beam, see Fig. 8, a spider T between which and the beam extends a journal post t. An arm or lever T' is journaled upon this post and extends forwardly under the beam to a point in front of the same where it carries an index finger t^2 projecting up and over the tare scale E. Said arm or lever also extends on the other side of its journal or pivot, though not to the same extent. However, it is weighted on the inner side of the pivot as indicated at t^3 so as to counterbalance the longer arm and prevent any change of equilibrium in the scale due to the swinging of this arm or lever itself. The swinging of the latter does, however, affect the equilibrium of the scale by changing the position of a weight T^3 journaled on the post t and engaged on opposite sides of the latter by adjusting screws t^4 entered through the lever T'. When the said lever is at normal or in position with the pointer t^2 registering with the zero mark on the scale, the weight T^3 is so disposed as to secure a normal equilibrium of the entire apparatus so that any weight placed upon the platter F^2 will move the beam and connected parts. However, swinging of the lever T' from such normal position will carry the mass of the weight T^3 toward the inner end of the beam, thus permitting the latter to overbalance the outer end and parts mounted thereon. Hence a certain amount of weight will be required on the platter before the beam will move. Of course the weight T^3 is so proportioned and adjusted as to make the scale E properly register the exact amount of weight required on the platter before the beam will move. This construction provides convenient means for taking out tare as by first placing a receptacle on the platter and noting its weight on the drum scale and then moving the pointer t^2 to the corresponding graduation on the tare scale E which of course brings the drum scale back to zero. These devices may also be utilized to double the capacity of the scale, as by throwing the lever T' to the extreme right-hand position where its pointer registers with the graduation representing five pounds. Then of course the beam will not move until five pounds of weight has been placed upon the platter or unless the amount of weight placed at one time upon the platter exceeds five pounds. It is evident that weight in excess of five pounds will be indicated upon the drum scale and to arrive at the total weight of the commodity it is only necessary to mentally add the five pounds and the weight indicated by the drum scale.

In order to prevent the lever T' from being accidentally moved out of normal position or from the five pound position a spring clip t^6 is fastened to the under side of the lever and carries a projection t^7 adapted to engage depressions in the under side of the beam.

Convenient means are provided for leveling the scale, it being understood that this is important particularly in a scale of the pendulum type. In the hollow base of the scales as illustrated in Fig. 9, near the rear end thereof, suitable bearings w are provided for a rock shaft W, the latter carrying

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a pair of arms W', see also Fig. 2. These arms are adapted to bear upon the surface on which the scale rests and it will be obvious that by rocking the shaft W the rear end of the scale can be raised or lowered to level the apparatus with reference to the plane in which the pendulum swings. A bifurcated arm w^2 also secured to the rock shaft W has pivotally connected to it a rod w^3 screwed into a yoke w^5 and another rod W^4 is screwed into the opposite end of said yoke and extends loosely through a boss on the front end of the base as shown at w^4. On the front end of said rod W^4 is secured a knob W^5. A small collar w^6 is secured to the rod W^4 and bears against the boss w^4 and it will be obvious that turning the knob W^5 will result in moving the yoke W^3 and rod w^3 longitudinally one way or the other and thus rocking the shaft W to properly adjust the arms W'.

It is desirable, if not practically essential, in apparatus of the kind described to provide some form of means for moderating the vibrations of the parts so that they will come to rest quickly. In the present instance a dash-pot cylinder X is mounted in an opening of the base as shown in Fig. 2 and a piston X' within said cylinder is connected by a rod x to an arm x' projecting from one side of the opening in the inner arm D' of the beam as clearly shown in Fig 8; see also Fig. 2. A cap X^2 is screwed into the top of the cylinder but packing around the piston rod is not necessary because the cylinder is made of larger diameter at the top than the bottom and the cap has a tubular portion x^4 surrounding the rod and extending inwardly far enough to prevent escape of contents of the cylinder when in shipment the scale might be turned on its side or inverted.

What I claim is:

1. In a weighing scale, the combination of a main beam pivoted intermediate its ends and carrying a load-receiver on one side of the pivot; load-counterbalancing and indicating means connected to said beam on the other side of its pivot; a counterbalanced circuit-closing lever normally held open by the weight of the arm of said beam to which said counterbalancing and indicating means are connected; and an electric lamp for illuminating the indicating means upon the rise of said arm of the beam and the consequent movement of the circuit-closing lever to closing position, the beam having an insulated pin normally restraining the circuit-closing lever.

2. In a weighing scale, the combination of a main beam pivoted intermediate its ends and carrying a load-receiver on one side of the pivot, and being overweighted on the opposite side of the pivot; a pendulum operatively connected to the overweighted arm of the beam and normally elevated thereby; an indicator connected to such arm of the beam; an electric lamp for illuminating said indicator; and a counterbalanced circuit-closing lever normally restrained by the overweighted arm of the beam.

3. In a weighing scale, the combination of a main beam pivoted intermediate its ends and carrying a load receiver on one side of the pivot, and being overweighted on the opposite side of the pivot; a pendulum operatively connected to the overweighted arm of the beam and normally elevated thereby; an indicator connected to such arm of the beam; a lamp circuit; and a circuit-closer normally held to open position by the overweighted arm of the beam.

4. In a weighing scale, the combination of a main beam pivoted intermediate its ends and carrying a load-receiver on one side of the pivot; and being overweighted on the opposite side of the pivot; a pendulum operatively connected to the overweighted arm of the beam and normally elevated thereby; an indicator connected to such arm of the beam; a lamp circuit; and a counterbalanced circuit-closing lever normally held to open position by said overweighted arm of the beam.

5. In a weighing scale, the combination of a suitable base; a scale beam mounted thereon and supporting a goods-receiver; a housing erected on the base; load counterbalancing and indicating means arranged in said housing and connected to the beam; a box-like superstructure on the housing and having transparencies in its sides; one or more electric lamps in said superstructure; and a lamp circuit controlled by the scale beam.

6. In a weighing scale, the combination of a suitable base; a scale beam mounted thereon and supporting a goods-receiver; a housing erected on the base; load-counterbalancing and indicating means arranged in said housing and connected to the beam; a box-like superstructure on the housing and having transparencies in its sides; one or more electric lamps in said superstructure; one or more electric lamps in the housing adjacent the indicating means; and a lamp circuit controlled by the scale beam.

7. In a weighing scale, the combination of a main beam pivoted intermediate its end and carrying a load receiver on one side of the pivot and overweighted on the opposite side of the pivot, a pendulum operatively connected to the overweighted arm of the beam and normally elevated thereby, an indicator connected to such arm of the beam, a lamp circuit, a counterbalanced circuit-closing lever normally held to open position by said overweighted arm of the beam, a contact with which the lever engages to close the circuit and an adjustment for regulating

the extent of movement of the circuit-closing lever.

8. In a device of the class described, a housing Q' having openings in the sides thereof, panes closing such openings, brackets Q^4 secured to the ends of the housing and having the fingers q and springs Q^5 held by said fingers and engaging the panes in the housing.

9. In a weighing scale, a beam having a scale pan at one end and weight at the other, indicating means, a lamp arranged to illuminate the indicating means, a circuit for the lamp including a delicately balanced normally closed switch lever mounted in juxtaposition to the weighted end of the beam, and means on the beam for swinging the lever to open the switch as said beam returns to normal position.

10. In a scale and in combination with the beam thereof, a rotary indicating cylinder, connections for rotating the latter from the beam, a casing including the indicating cylinder, stationary bearings in the casing in which the shaft of the indicating cylinder rests, and means for raising the shaft away from its bearings for shipment.

11. In a scale and in combination with the beam thereof, a rotary indicating cylinder, connections for rotating the latter from the beam, a casing including the rotary indicator, stationary bearings in the casing in which the shaft of the indicator rests, and plates N beneath the shaft and adjustable toward the latter to raise it from its bearings for shipment.

12. In a scale and in combination with the beam thereof, a rotary indicating cylinder, connections for rotating the latter from the beam, a casing including the rotary indicator, bearings in the casing in which the shaft of the indicator rests, and plates N beneath the shaft and adjustable toward and from the same and screws for adjusting the plates.

13. In a weighing scale having a hollow base, a rock shaft extending transversely thereof near one end, arms on the rock shaft of substantially equal length adapted to bear against a suitable support for the base, other arms on the rock shaft, a yoked rod pivoted to the last named arms, a threaded rod extending from the other end of the base and tapped into the yoke for the purpose of adjusting the rock shaft.

14. In a weighing scale, a hollow beam, a lever T' pivoted within the beam, a weight T^3 mounted upon the same pivot as the lever, screws T^4 tapped through the lever and engaging the weight upon opposite sides of the pivot, a tare scale E and a pointer T^5 upon the lever coöperating with the tare scale.

LEWIS CALVIN WETZEL.

Witnesses:
M. L. THOMPSON,
E. J. SHEFFER.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

2969

1818

A. DE VILBISS, Jr.

SCALE.

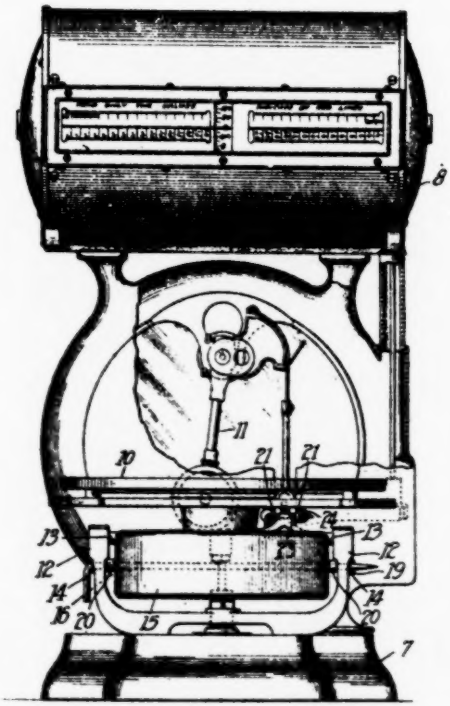
APPLICATION FILED AUG. 16, 1910.

1,122,232.

Patented Dec. 22, 1914.

3 SHEETS—SHEET 1.

Fig. 1.



Witnesses
Martin H. Olsen.
Robert Dobberman.

Inventor
Allen De Vilbiss, Jr.
By Rector, Hibben, Davis & Macauley
Attys

2970

A. DE VILBISS, Jr.

1820

SCALE.

APPLICATION FILED AUG. 15, 1910.

1,122,222.

Patented Dec. 22, 1914.

2 SHEETS—SHEET 1.

Fig. 3

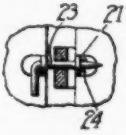


Fig. 2.

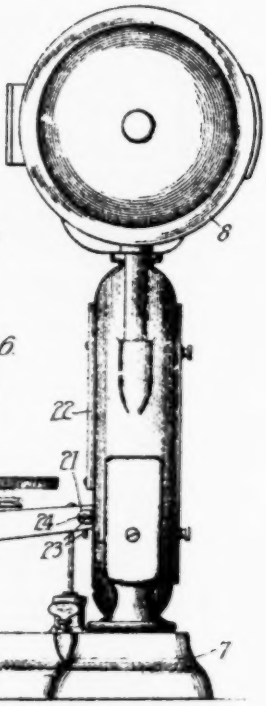


Fig. 4.

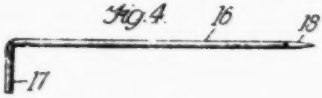


Fig. 5.

Fig. 6.

Witnesses
Martin A. Olsen.
Robert D. Olberman.

Inventor
Allen DeVilbiss Jr.
By Peck, Mills, Levi & Peck
Attys

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UNITED STATES PATENT OFFICE.

ALLEN DE VILBISS, JR., OF TOLEDO, OHIO; SHOLTO M. DOUGLAS, ADMINISTRATOR DE BONIS NON UPON ESTATE OF SAID DE VILBISS, JR., DECEASED, ASSIGNOR TO TOLEDO SCALE COMPANY, OF NEWARK, NEW JERSEY.

SCALE.

1,122,222. Specification of Letters Patent. Patented Dec. 22, 1914.

Application filed August 13, 1910. Serial No. 577,393.

To all whom it may concern:

Be it known that I, ALLEN DE VILBISS, Jr., a citizen of the United States, and a resident of Toledo, county of Lucas, State of Ohio, have invented certain new and useful Improvements in Scales, of which the following is a specification.

My invention relates more particularly to balance or beam scales in which the parts and more especially the bearings are necessarily more or less delicate where accuracy is required and therefore liable to injury during transportation. It is obviously desirable that the scales be packed for shipment as nearly as possible in a condition and relation of parts in which they are to be used, but whether shipped in assembled condition or otherwise the problem of packing to prevent injury is a serious one.

By my present invention means are provided for blocking up the lever or beam and securely locking it from movement, whereby the scales may be safely shipped with the beam and associated parts in substantially the position which they occupy in use.

In the accompanying drawings, a cylinder scale is shown with my improvements applied thereto, but it is obvious that they are equally applicable to other forms of scale in which a balanced beam is employed.

Figure 1 is a view in front elevation with parts of the casing broken away to show the interior mechanism; Fig. 2 is a view in side elevation and Figs. 3, 4, 5 and 6 are details the precise nature of which will be understood from the following description.

The base 7, indicating cylinder 8, beam 9 and platform 10 are all made of any usual or desirable form but since they are not claimed herein *per se* detailed description thereof is unnecessary. In Fig. 1 the counterbalancing pendulum 11 and its connections to the beam are shown but these details likewise are not concerned in the present invention. The beam is mounted on standards 12 which are provided with bearings of a suitable character for the knife edges 13 which may be of any usual or preferred form. Beneath the knife edges in the standards are registering perforations 14 14 which may be brought into registry with a similar perforation 15 in the beam by slightly raising the latter. In Fig. 4 is shown the pin or rod 16 which is adapted to fit loosely within the openings 14 15 when the latter are brought into registry. The pin 16 is provided with a bent portion 17 at right angles thereto and is tapered at the other end 18 to facilitate insertion in the perforations 14 15. The necessary elevation of the beam 9 is so slight that the taper on the pin 16 is sufficient to accomplish it when thrust into place. A cotter pin 19 secures the pin 15 from dislodgment and spacing sleeves 20 loose upon the rod 16 prevent sidewise movement of the beam. In order to prevent movement of the beam around the bearing or around the rod 16 I have provided an additional locking pin by which the nose of the beam is secured to the casing. For this purpose the latter is provided with perforated ears or lugs 21 shown in Figs. 1, 2 and 3, which are arranged on opposite sides of the opening through which the nose of the beam enters the casing 22. The beam is also bored at a point which may be brought into registry with the openings in the ears 21 and a pin 23 substantially like the pin 16 but shorter is inserted through the registering openings in the ears and beam and locked therein by a cotter pin 24 prior to shipment. In order to release the beam and put it in condition for service when the scale reaches its destination, it is only necessary to withdraw the pins 16 and 23.

What I claim is:

1. In a scale, a beam, and supports therefor, having perforations arranged to be brought into registry, and a locking rod for insertion in the perforations.

2. In a scale, a beam, and supports therefor, having perforations arranged to be brought into registry, and a locking rod for insertion in the perforations, the latter being so arranged that they are in alinement when the beam is lifted slightly from its bearings.

3. In a scale, a beam, and supports therefor, having perforations arranged to be brought into registry, a locking rod for insertion in the perforations, the latter being so arranged that they are in alinement when the beam is lifted slightly from its bearings, and means to secure the rod against displacement.

4. In a scale, a beam having a perforation in the nose thereof, lugs on the casing

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having openings arranged to register with the perforation in the scale beam, a rod for preventing movement of the scale beam, and means for securing the rod against dislodgment.

5. In a scale, a beam, and beam supports, each provided with perforations, a locking rod for insertion therein, the perforations being so arranged that they are in alinement when the beam is lifted slightly from its bearing, and spacers arranged on the rod between the beam and the bearing.

6. In a scale, a scale beam, a frame through which the nose of the beam extends, the beam and frame on each side thereof being perforated, the perforations being so placed that they may be brought into alinement, and a rod adapted to extend transversely through the perforations in the beam and frame to lock the former against accidental movement during shipment.

ALLEN DE VILBISS, Jr.

Witnesses:
ARTHUR STULL,
F. A. CROWLEY.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Patents, Washington, D. C."

2973

1824

C. H. HAPGOOD.

SCALE.

APPLICATION FILED JULY 18, 1910.

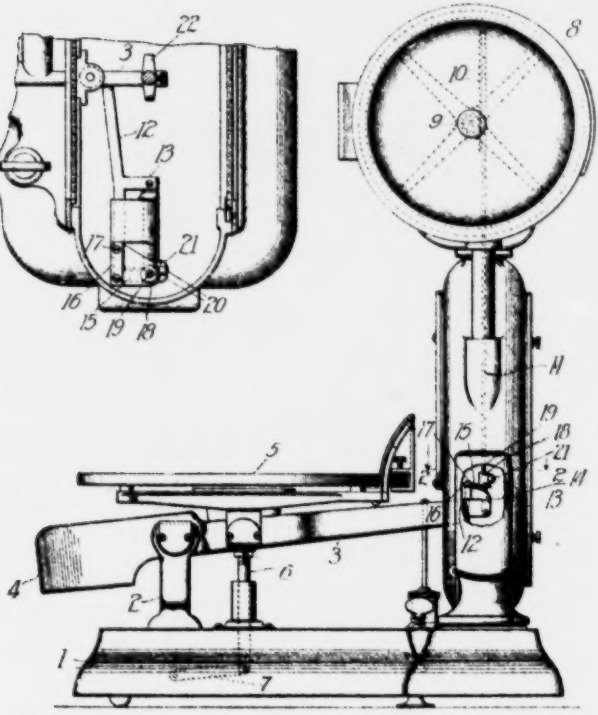
1,142,165.

Patented June 8, 1915.

2 SHEETS—SHEET 1.

Fig. 2

Fig. 1



Witnesses
Martin M. Allen.
Robert Dobberman

Inventor
Clarence H. Hapgood
By Richardson, Davis, Hanaway & Atty's

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C. H. HAPGOOD.

SCALE.

APPLICATION FILED JULY 16, 1910.

1,142,165.

Patented June 8, 1915

2 SHEETS—SHEET 2.

Fig. 3.

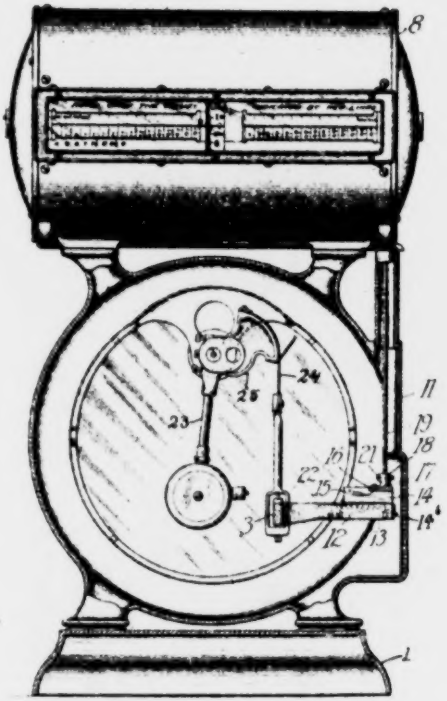
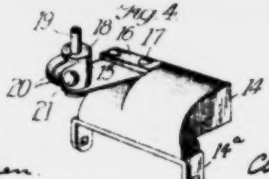


Fig. 4.



Witnesses

Marian H. Green

Robert Dobberman

Inventor

Clarence H. Hapgood

By Redfield, Hirsh, Davis & Kennedy

Attys.

2975

1827

UNITED STATES PATENT OFFICE.

CLARENCE H. HAPGOOD, OF TOLEDO, OHIO, ASSIGNOR TO TOLEDO SCALE COMPANY, OF TOLEDO, OHIO, A CORPORATION OF NEW JERSEY.

SCALE.

1,142,165. Specification of Letters Patent. Patented June 8, 1915.

Application filed July 18, 1910. Serial No. 572,474.

To all whom it may concern:

Be it known that I, CLARENCE H. HAPGOOD, a citizen of the United States, residing at Toledo, in the county of Lucas and State of Ohio, have invented certain new and useful Improvements in Scales, of which the following is a specification.

My invention relates more particularly to scales having indicating mechanism operated from a moving part of the scale. Where the indicator mechanism is of more than an inconsiderable mass, the sudden movement of the scale member due for example to placing a heavy article upon it is apt to injure or wear the mechanism for transmitting motion to the indicating device.

It is the object of my present invention to reduce or obviate injury to the scale by reason of such sudden impulses by interposing between the scale member and the mechanism a spring or other resilient device which will take up the shock or jar.

My invention is shown in the accompanying drawings in which—

Figure 1 is a side elevation of a scale partly broken away to show the operating mechanism; Fig. 2 is a horizontal section on the line 2—2 of Fig. 1 of that part of the apparatus to which my invention particularly relates; Fig. 3 is an elevation partly in section of the scale at right angles to Fig. 1; and Fig. 4 is a detail perspective.

The particular form of scale in connection with which I have illustrated my invention is a platform scale with a computing cylinder indicator though it will be obvious that the invention is of wide application and may be used in connection with any scale having indicator mechanism operated from the scale through connections liable to injury by shock or jar. In this particular embodiment shown in the drawings the base 1 supports the standards 2 in which the beam 3 is pivoted. The beam is counterweighted as at 4 and carries the platform 5 which is maintained in substantially horizontal position by the rod 6 connected to the link 7 which is pivoted at a suitable point beneath the standard to the platform. The indicator mechanism consists of a cylinder mounted on trunnions within the casing 8 provided at one end with a pinion 9 which meshes with a rack 10. The rack is extended in the form of a rod 11 by which it is pivotally connected to the scale beam.

The apparatus thus far described is old in the art as shown for example in the patent to Hapgood, No. 903,083, patented November 3, 1908.

As indicated above it has been found that where the connection between the beam and the indicating mechanism is inelastic a certain amount of injury is done to the mechanism of the indicator by shocks and jars caused by the sudden placing or dropping of heavy articles upon the platform. In my improved scale this is obviated by the following construction. The scale beam is provided at its end with an arm or bracket 12 extending at right angles thereto and provided near its end with a pair of lugs 13 with horizontal perforations near their outer ends. A casting 14 is pivoted between these lugs in such a manner that it is capable of a rocking movement, by means of a plate 14′ secured to one edge of the bottom of the casting and provided with downwardly extending perforated ears 14^a 14^a which receive screws or pins 14^b extending through the lugs upon the bracket 12 for this purpose. The perforations in the ears 14^a—14^a may be square if desired and the pins 14^b, corresponding in shape at the portions thereof which engage these perforations in order that the rotation of the pin may be with respect to the ears 13 on the beam where longer bearings are provided. If desired, however, the pins may be rounded throughout their length and the holes in the ears 14^a corresponding in shape. A substantially triangular leaf spring 15 is secured at one edge to the casting by a reinforcing strip 16 and screws 17 and at its opposite corner is provided with a socket 18 for the reception of the connecting rod 19. This socket is split and provided with lugs 20 through which extends a screw 21 by which the socket may be tightened around the connecting rod. It may also be tapped if desired for greater security and the connecting rod correspondingly threaded at its end.

It will be obvious that the spring normally occupies an intermediate position from which it may be flexed in either direction and is therefore double-acting. The beam 3 is connected with a pendulum counterbalance 23 through a stirrup 22, band

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24 and segment 25. The pendulum counterbalance, however, is shown in the patent to De Vilbiss 839,736, dated December 25, 1906, and forms no part of my present invention.

What I claim is:

1. In a scale, a beam, a rocking member pivoted thereon and carrying a leaf spring, and connections for moving the indicating mechanism connected to the leaf spring.

2. In a scale, the combination with the beam and indicating mechanism, a rack and pinion for operating the indicating mechanism and connections between the rack and the beam including a rocking member pivoted to the beam and carrying a leaf spring to which the rack is connected.

3. In a weighing scale having a rotary cylinder indicator, a beam 3 having an offset member 12, lugs 13, upon the member 12, a rocking member 14 pivoted between the lugs, a spring 15 secured along one edge to the rocking member and provided at its outer end with a collar 18, a rack bar 19 secured at one end within the collar, and a pinion upon the rotary cylinder with which the rack bar coöperates.

4. In a weighing scale having a beam and a computing drum, a connecting rod for rotating the latter, a casting pivoted to th scale beam and a spring connecting the cas ing and connecting rod.

5. In a weighing scale having a beam an a rotary indicator, a pinion on the shaf the latter, a rack rod, the rack of w meshes with said pinion, a casting pivote to the beam, a spring connecting the castin and rack rod, said casting being ove weighted on that side of its pivotal ax on which the pinion is located.

6. In a weighing scale of the class de scribed, having a beam and a rotary ind cator, a pinion on the shaft of the latter, rack rod, the rack of which meshes wit the pinion, a casting pivoted to the beam an over-weighted on that side of the pivot axis thereof upon which the pinion is locate and a leaf spring rigidly connected to th rack rod at one end and at the other to th casting at a point thereof at one side of th vertical plane of its pivots, the rack rod b ing supported substantially in said plane.

CLARENCE H. HAPGOOD.

Witnesses:
ALLEN DE VILBISS, Jr.,
E. LONGENECKER.

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C. H. HAPGOOD.

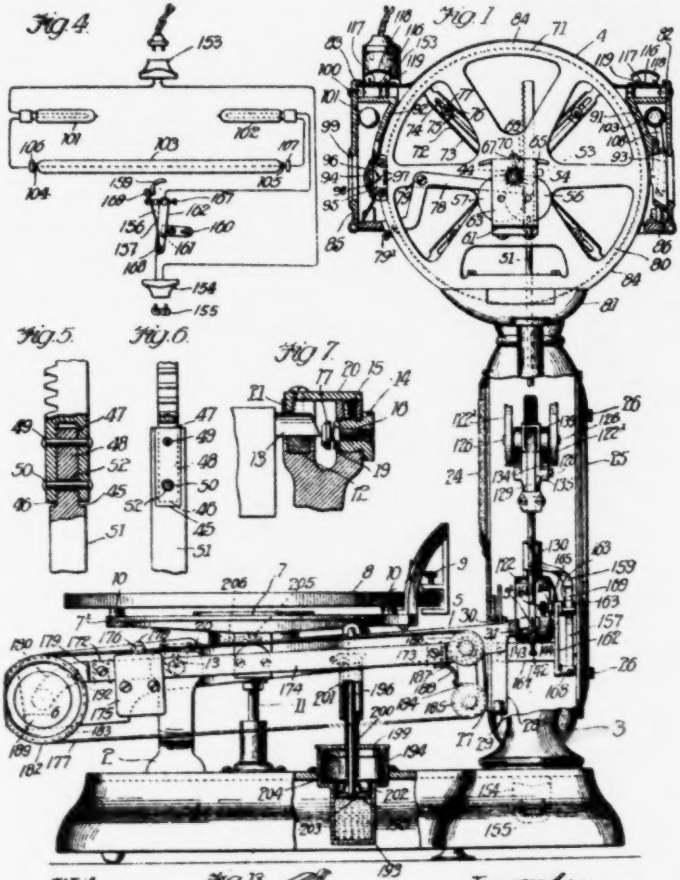
WEIGHING SCALE.

APPLICATION FILED SEPT. 25, 1911.

1,166,128.

Patented Dec. 28, 1915.

3 SHEETS—SHEET 1.



Witnesses

Martin H. Olsen.

Robert Dobberman

Inventor

Clarence H. Hapgood

By Rector Hibben Davis & Macy

Attys

2978

1832

C. H. HAPGOOD.

WEIGHING SCALE.

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3 SHEETS—SHEET 2.

Fig. 2.

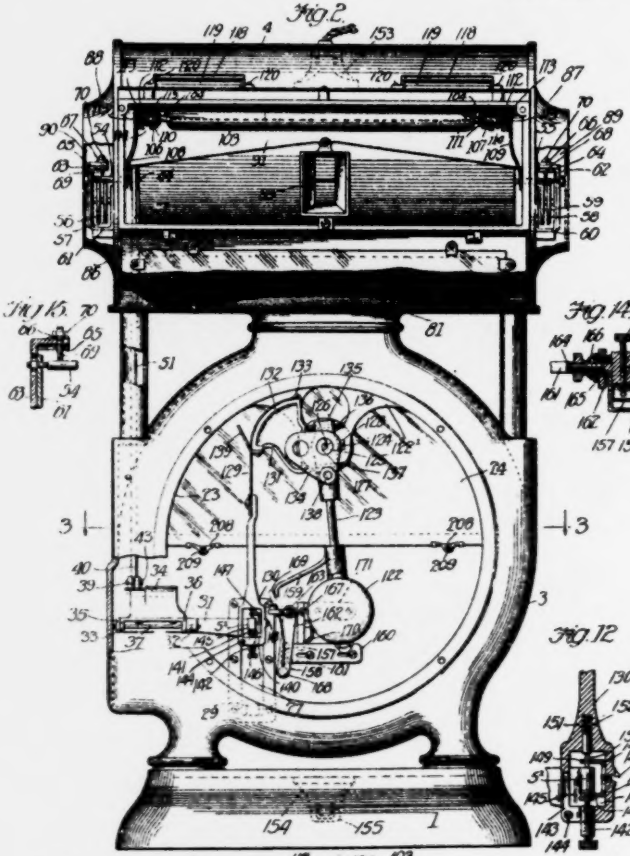


Fig. 10.

Fig. 14.

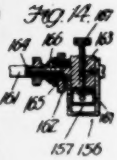


Fig. 12

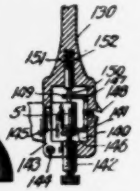
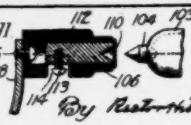


Fig. 11



Witnesses

Martin McOlsen

Robert Dobberman

Inventor

Clarence H. Hapgood

By Peter Hitchcock Brainerd & Hapgood

Attys

2979

1834

C. H. HAPGOOD.

WEIGHING SCALE.

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1,166,128.

Patented Dec. 28, 1915.

3 SHEETS—SHEET 3.

Fig. 3.

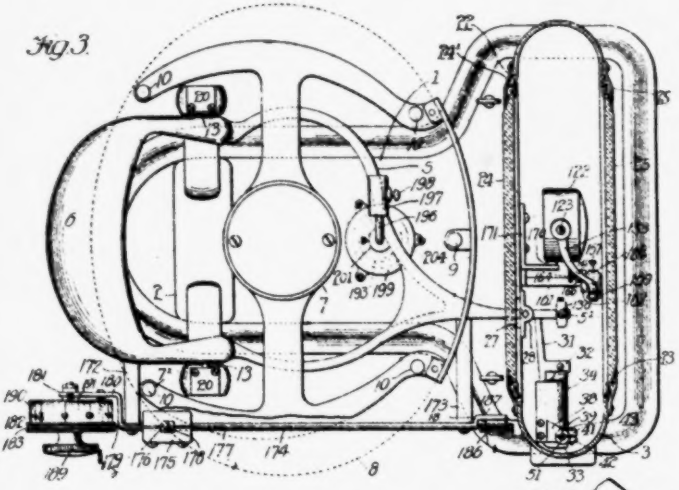

Fig. 8.

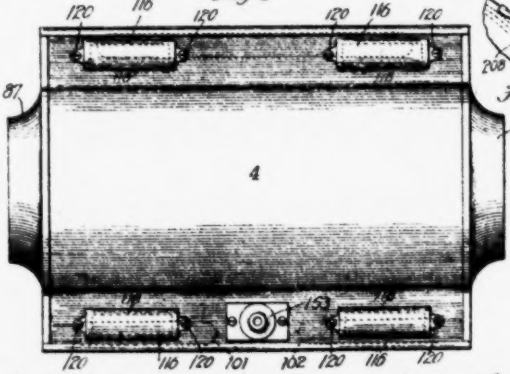

Fig. 9.

Fig. 10.

Witnesses

Martin Tebbetts

Robert J. Dibberman

Inventor

Clarence H. Hapgood

By Rector, Hibben, Davis & Macrae

Attys.

2980

1835

UNITED STATES PATENT OFFICE.

CLARENCE H. HAPGOOD, OF TOLEDO, OHIO, ASSIGNOR TO TOLEDO SCALE COMPANY, OF TOLEDO, OHIO, A CORPORATION OF NEW JERSEY.

WEIGHING-SCALE.

1,166,128. Specification of Letters Patent. Patented Dec. 28, 1915.

Application filed September 25, 1911. Serial No. 651,045.

To all whom it may concern:

Be it known that I, CLARENCE H. HAPGOOD, a citizen of the United States, residing at Toledo, in the county of Lucas and State of Ohio, have invented certain new and useful Improvements in Weighing-Scales, of which the following is a specification.

My invention relates more particularly to that class of weighing scales employing a pendulum as the variable counter-balance for the load of commodity being weighed and a rotary cylinder value-indicating chart having a series of annular rows of numerals, each row representing values of progressively greater weights of materials at a uniform price per unit of weight and the several rows representing values at proportionately increasing prices per unit of weight; but it will be obvious from the following detailed description that certain features of my invention are applicable to scales of other types than that above referred to and though I have described my invention in connection with a rotary cylinder computing pendulum scale I have done so merely for the purpose of illustration so far as many of the features of my invention are concerned and it will be understood that I am not limited to this particular form of scale except in so far as it may form a feature of the following claims which point out the true scope of my invention and are intended as a measure thereof, due allowance being made for equivalents.

Referring now to the drawings accompanying and forming a part of this application, Figure 1 is a vertical elevation of a computing pendulum scale embodying my invention, parts, however, being broken away and other parts shown in section and the casing of the computing chart being shown with one end removed for the purpose of disclosing the interior mechanism; Fig. 2 is a rear elevation of the scale, parts being broken away and shown in section as in Fig. 1 and for a like purpose; Fig. 3 is a section upon the line 3—3 of Fig. 2, parts being broken away to show the construction; Fig. 4 is a diagrammatic representation of the wiring installed in connection with the electric lamps which I employ for illuminating my scale; Figs. 5 and 6 are details at right angles to each other partly in section of the portion of the rack by which the chart is operated; Fig. 7 is a vertical section of one of the main bearings or fulcra of the beam; Fig. 8 is a top plan of the chart casing showing certain parts in dotted lines; Figs. 9 and 10 are details, the former in front elevation and the latter in section of the means for securing certain panes of glass in the casing of the scale; Figs. 11-15 refer to various details to which reference will be made below.

In the following detailed description like numerals are used throughout to designate the same part of the device.

In the particular embodiment of my invention shown, the base 1 is provided near one end with standards 2 which carry at their upper ends the bearings for the support of the main beam and at its other end the base sustains a substantially watch-shaped casing 3 surmounted by a cylindrical facing 4. The beam consists of an irregular casting 5 weighted at the end 6 (see Fig. 3) and supporting between its fulcra and its other end a commodity receiver 7 which is or may be pivoted or supported upon the beam in the usual way by knife edge bearings. The commodity receiver may consist of the usual casting 7′ supporting a disk 8 of glass or other suitable material clamped in place by means of the thumb screw 9 and resting upon supports 10 projecting upwardly from the casting. To preserve its substantially horizontal position, the casting 7′ is provided with a downwardly projecting rod or stud 11 which is pivoted within the base 1 to a check link of any approved construction not shown. The features just referred to are common and well-known in this art and need not be specifically described. The long end of the beam which carries the commodity support projects into the casing 3 within which it is connected to a rack bar which latter engages at its upper end a pinion upon the rotary chart as is not uncommon in devices of this character.

The upper ends of the standard 2 are recessed as at 12 (see Fig. 7) for the reception of agates and the latter are provided with the usual V-shaped grooves for the reception of the knives 13 of the beam. At a point

stantially opposite the knife bearings, h standard is provided with a tapped ning, receiving screw 14 which is adjust- e in said opening and may be locked in nsted position by a set screw 15. The ew 14 is in turn bored and tapped con- trically to receive a screw 16 which bears n its inner end a head 17 of hardened el which may be adjusted with relation to screw 14. A lock nut 19 secures the ew 16 in adjusted position with relation screw 14. A cavity in the standard is sed by a cap plate 20 having a flange 21 one edge which depends within the side lls of the cavity over the knife edge. It ll be readily understood that lateral mo- n or play of the beam may be prevented adjusting the heads 17 with relation to e screw 14 so that when the latter are iven home or into their ultimate position e heads 17 barely clear the ends of the ives 18 and prevent endwise movement ereof. The cap plate forms with the walls f the cavity substantially a complete clo- re, so that the bearing is as nearly dust roof as is compatible with the rocking of e knives.

The watch-shaped casing 2 is formed on s front and rear faces respectively with indows 22—23, the latter of which is sub- antially circular and the former semicir- ular, and each of these openings is closed y a pane of glass 24—25, secured in a uitable metal frame 24′, 25′, which is at- ached to the casing by screws as 26. The asing is also formed with a vertically elon- ated slot 27, within which swings the end f the beam, and which is surrounded by flanged frame 28, carrying cushions 29—30 hich limit movement of the beam at the pposite ends of its swing. Within the cas- ng 3 the beam is provided with an offset rm 31 (see Figs. 2 and 3) to which are ecured the connections for operating the ylinder chart. For this purpose the arm 31 s formed by casting or otherwise with rackets 32—33 between which is pivoted rocking element 34 provided with depend- ng ears 35—36 through which and the rackets 31—32 extends a journaled pin 37 (Fig. 2). To the rocking element 34 is secured a plate spring 38 which bears at its outer end a split socket 39 which receives the lower end of the rack bar 40 for driving the cylinder chart. The members of the split socket are provided with ears 41—42 which receive a screw 43 by which the socket is clamped about the rack bar. The latter element engages at its upper end a pinion 44 upon the shaft of the chart cylin- der (see Fig. 1) and is jointed intermediate its ends, as shown more particularly in de- tailed views (Figs. 5 and 6), to permit slight adjustment with reference to the teeth of the pinion. As shown in the detailed views the lower member is slabbed off at op- posite sides at 45—44 and the upper mem- ber is slotted as at 47 to receive the reduced end 48 of the lower member and the two members are pivoted by the pin 49 and held in general alinement by the pin 50 which however is permitted a slight movement with reference to the lower member 51 by reason of the loose fit of the pin in the opening 52. By this provision the rack is prevented from binding upon the pinion in case of a slight inaccuracy of adjustment of the parts. The upper end of the rack bar is guided and held in operative rela- tion to the pinion by means of a guide member 53.

The journals 54—55 of the cylinder chart rest and rotate upon pairs of over-lapping anti-friction wheels or disks 56, 57, 58 and 59, the members of each pair being pivoted upon opposite sides of and beneath the jour- nals, as shown more especially in Fig. 1, and are spaced from each other laterally as shown in Fig. 2 to permit independent rotation notwithstanding the lap thereof, as shown in Fig. 1. The journals of the anti-friction disks are mounted in the walls of U-shaped bracket pieces 60—61 secured to the ends of the casing in any suitable manner and provided with protecting cover plates 62—63 (Figs. 1, 2 and 15) which overlie the ends of the axles of the anti- friction disks and the journals of the chart cylinder. These plates 62—63 are also shown with rectangular extensions 64—65 which extend inwardly and above the bear- ing members as a further protection against dust and are tapped at 66—67 to receive screws 68—69 which are adjusted to just clear the axles of the journals of the chart cylinder to prevent the latter from jumping from their proper position in case of a vio- lent movement imparted to the pinion. Locking nuts 70, 70′ secure the screws in their adjusted position. By the specific con- struction just described the journals are to a large extent protected from dust and for- eign substances and dislocation thereof is also prevented.

The rotary cylindrical chart is in the main of the ordinary construction comprising the cylindrical member 71 shown in dotted lines in Fig. 1 supported at either end by a spider comprising the thin sheet metal arms 72. The spider may be secured to the bearing shaft in any well-known manner, and the arms thereof are flanged as at 73 (Fig. 1) to provide greater rigidity, and slotted as at 74 for the reception of small weights 75, which are secured to the arms in adjusted position by means of screws 76, passing through washers 77 and tapped into the weights 75. It is essential in charts of this character that they be poised with great nicety with regard to their axes, other-

wise there is a tendency to rotation toward a favored position and consequent interference with correct weighing. By the provision of these adjustable weights upon the arms of the spiders, however, any inequality or overbalance of the cylinder caused by eccentricities in its construction or variations in the weights of materials or due to any other cause may be counteracted.

As shown in Fig. 1, bell crank levers 78 of thin sheet metal are pivoted to the casing at 79, there being such a lever at each end of the casing and these levers extend beneath the ends of the arbors of the chart cylinders and may be adjusted by means of screws 79' to lift the journals from their normal bearing for the purpose of shipment and in order to avoid damage to the bearing.

The cylindrical housing 4 includes a pair of end castings 80 mounted upon a support 81 which is in turn secured to the top of the watch-shaped casing 3. These end castings are open as shown in Fig. 1 and centrally bored for the passage of the cylinder shaft and are also connected by cast metal frames 82—83 extending between the end casting at the front and rear of the housing and surrounding or framing the front and rear reading positions of the chart. The casing is completed by sheet metal sheathing 84 extending between the frames 82 and 83 above and below the cylinder, hinged cover plates 85—86 over the openings in the frames 82 and 83 and end caps 87—88 provided with glazed openings 89—90 as shown more particularly in Figs. 2 and 8. The frames 82 and 83 are formed with longitudinally extending webs 91—92 next to the chart for a purpose which will appear, and between the web 91 and the lower edge of the corresponding frame at about the longitudinal center thereof is arranged a boxing 93 which forms the sight opening at the back of the scale for the customer, the chart bearing a series of weight indications centrally thereof to register with this opening. The hinged cover plate 86 is also formed with an opening coinciding with the boxing 93 and suitably glazed to facilitate inspection of the weight numerals by the customer. In the boxing 93 upon the front of the scale, however, the sight opening extends entirely the length of the cylinder and is closed by a lens 94 through which the computation indications may be seen magnified. Upon either end casting and opposite the ends of the lens is secured a sheet metal plate 95 notched as at 96 adjacent the lens and formed at its opposite edge with a pair of struck-up ears 97 and, between these pairs at the opposite ends of the cylinder, is stretched centrally of the lens a wire 98 supported at opposite ends in the notches in the plates 95 and secured around the lugs 97. This wire is properly placed to form a reading line for determining the correct reading of the chart. The swinging cover plate 85 is, of course, provided with a corresponding opening 99 extending substantially the length of the housing through which the reading of this scale may be made, and both doors are secured, when closed, by suitable screws 100.

Within the frames 82 and 83 and above the reading openings are mounted electric lamps for illuminating the chart at the reading positions. The illumination within the frame 83 is secured by a pair of incandescent lamps 101 and 102 mounted at opposite ends of the frames in sockets of any ordinary or approved construction, but the illumination within the frame 82 is obtained by means of an elongated lamp 103 extending substantially the length of the casing and containing a filament, the contacts 104—105 of which are arranged at the opposite ends of the tube containing the filament (see Figs. 1, 2 and 4). The lamp 103 is removably supported and connected by means of contacts 106—107 mounted upon leaf springs 108—109 secured to the ends of the frames (see Figs. 2 and 11). Each contact consists of a cylindrical plug of metal having a cavity 110—111 in the end thereof and mounted in an insulating member 112 which has a central bore for the reception of a contact member on the lamp. The contacts 106—107 are tapped transversely at their inner ends for the reception of screws 113 for the attachment of the leading in wire and, in order to provide access to the screws the insulation is cut away as at 114 (see Fig. 11). The insulating member is secured to the spring by a screw 115 extending through the end thereof.

By using a lamp of the character described and mounting it in the manner above stated the entire length of the reading position of the chart is illuminated and at the same time the lamp may be readily removed by pressing outwardly the spring members carrying the contacts on the frame when it is desired to replace the lamp or to clean the structure. In order to prevent overheating the casing I have provided for ventilating openings 116 shown in vertical cross section in Fig. 1 and in dotted lines in Fig. 8 which are covered by wire gauze 117 (see Fig. 1) and protected by hoods 118 having sight openings 119 (see Figs. 1 and 2). As shown these hoods are made separate from the casing and secured thereto by screws 120 extending through ears on the hoods. The webs 91 and 92 heretofore mentioned protect the chart from the heat of the more direct rays of the lamps at the positions of the charts which are directly opposite the lamps so that the rays where they strike the chart are substantially tangential thereto and somewhat remote from the sources of heat and light.

Within the casing 3 is mounted the pendulum 122 which constitutes the variable load counterbalance of the scales. This element includes a weight and a rod 123, the latter having an enlarged upper end 124, counterbored for the reception of the arbor 125 which carries the knives 126 on which the pendulum is swung from brackets 122' secured to the casing (see Fig. 2). The arbor as shown in said figure consists of a sleeve or cylinder having a central bore and a radial section of its metal removed to form a seat for the knife which extends longitudinally of the arbor and projects therefrom at opposite ends, the apex of the knife being in the axis of the arbor. If desired, to facilitate yielding thereof, the arbor may be provided with a kerf 127 opposite the removed section. The counterbore in the enlarged upper end of the pendulum rod receives the arbor with a drive fit and a screw bolt 128 tapped into the pendulum rod, bears against the arbor and prevents rotation thereof relative to the piston rod. Motion is transmitted from the end 5' of the main beam (see Figs. 2 and 3) to the pendulum through a strap 129 connected to the beam by a stirrup 130, and to the pendulum by a casting 131 formed with a segment 132 with which the strap directly coöperates and to which it is secured at one end by a screw 133. The casting also comprises cheek pieces 134 which are counterbored for the reception of the ends of the arbor 125 upon which the casting is mounted and are spaced apart a sufficient distance to receive between them the enlarged end of the pendulum rod before referred to (see dotted lines, Fig. 2). The latter is provided with an upwardly extending lug 135 which receives an adjusting screw 136 and a similar adjusting screw 137 is inserted through the rod below the arbor and knife, both such screws being arranged to bear upon flattened surfaces upon the casting 131 on opposite sides of the arbor for the purpose of adjusting the pendulum angularly with relation to the casting as plainly seen in Fig. 2 of the drawing. By this construction the position of the cam segment 132 which, as will be seen, is eccentric to the arbor, may be nicely adjusted with reference to the pendulum to secure the desired movement of the pendulum with relation to that of the beam. In order, however, to relieve the parts of strain under which they would otherwise remain by reason of the pressure of the screws 136 and 137 the cheek pieces 134 are perforated for the passage of a screw bolt 138 which passes freely through the perforation in one of the cheek pieces and through a transverse slot in the pendulum rod head and is tapped into the other cheek piece. After the parts have been adjusted to the required position by the screws 136—137, during which adjustment the bolt 138 is loose, the latter is tightened and the parts are thereby held in their adjusted position. If desired the strain on the screws 136 and 137 may then be relieved of their pressure by slightly withdrawing them. A slotted guide 139 prevents the strap 129 leaving its segment in case of a sudden motion of the parts.

The stirrup 130 is formed with the usual eye or loop 140 (see Figs. 1, 2 and 12) which embraces the end 5' of the scale beam and is provided with an adjustable seat 141 for the usual cone pivot on the beam, the screw 142 which carries the seat being tapped through the lower end of the loop, which latter is split downwardly as at 143 and provided with a set screw 144 for drawing the sections of the loop together and binding the screw 142. The inner head of the screw constituting the bearing is circumferentially grooved as at 145 and embraced by the bifurcated end 146 of a U-shaped slide 147 which is vertically guided by a pin and slot connection 148 with a side wall of the loop. The upper limb of the slide is perforated at 149 to receive the reduced end of a sliding pin 150 which reciprocates within a cavity 151 in the stirrup member and is urged downwardly by a spring 152 in the cavity as shown in Figs. 2 and 12. The purpose of the pin 150 is to prevent the cone pivot on the beam leaving its seat in the stirrup and since the projection of the pin from its cavity is limited by the slide, the adjustment of the screw carrying the socket also adjusts the position of the pin with relation to the upper side of the beam. It will be understood that the slide and pin are so proportioned that when the cone pivot is properly centered in the socket the pin 150 just clears the upper face of the beam sufficiently to permit the free movement of the latter.

The precise wiring of the lamps is not material and might be worked out by any one familiar with wiring practice but it is important that sockets be provided for the attachment of leading-in wires either above or below the scale as may be desired, but in Fig. 4 I have shown diagrammatically a system of wiring suitable for my purpose The connections of the parts are apparent from an inspection of the diagram and it is sufficient to call attention to the fact that at 153 is a connection socket which is located on top of the scale as shown in Fig. 1 and at 154 a socket attached to the bottom of the scale also indicated in Fig. 1, though in dotted lines, and when one of these sockets is in use the other is bridged, a device 155 for the purpose being shown in Figs. 1 and 4. The purpose of this part of my construction is to provide for lighting the scale only when it is put in operation and with this in view I have provided a switch 156 adapted to be opened by the pendulum which holds it open

when in normal position but permits the switch to close when the pendulum is elevated is by putting a weight upon the commodity receptacle. For this purpose the switch consists of a leaf spring 157 mounted at its lower end in a bracket 158 and projecting at its upper end into the path of an arm 159 carried by the pendulum. The bracket 158 is adjustably secured to the wall of the casing by a slotted plate 160 and comprises a lateral arm 161 and an upright end member 162, the latter supporting at its upper end a post 163 which is secured to the upright member by a reduced screw-threaded end 164 formed upon the post, and projecting through a perforation in the end of the upright member from which, however, it is insulated by the insulating sleeve 165 (see Fig. 14). The reduced screw-threaded end of the post receives a nut 166 by means of which the post is secured in position and beyond the nut is provided with a thumb nut for securing one of the leading-in wires of the switch in connection with the stationary contact of the switch which is formed by an adjustable screw 167 tapped into and through the post 163. The lower end of the upright member is provided with a binding post 168 which is in electrical connection with the spring switch member 157 and the upper end of the latter, in the construction shown, is reinforced at 169 for contact with arm 159. It will be understood that the bracket 158 and the contact 167 are so adjusted that the pendulum arm 159 barely separates the spring contact from its seat when the pendulum is in its normal position, and therefore the slightest movement of the pendulum permits the switch to close, the circuit then being formed through the binding post 168, switch 157, contact 167, post 163 and binding post 164. In order to protect the mechanism a buffer 170 is provided for the pendulum, which buffer is mounted upon a bracket 171 adjustably secured to the wall of the casing.

A further feature of my invention consists in a new tare device which I will now describe as follows, reference being had to Figs. 1 and 3: The scale beam is formed or provided with supporting arms 172–173 upon which at their outer ends is mounted a guide strip 174 extending parallel with the beam. Upon this guide is mounted to slide a tare weight 175 which may be of any desired construction but is formed at its upper end with a boss 176 through which passes an endless belt or cord 177 which has for its purpose the reciprocation of the tare weight along its guide. A set screw 178 clamps the cord or ribbon in the boss and prevents relative motion between the same and the tare weight. At one end the guide 174 is prolonged and bent at substantially right angles to the plane of its face as at 179 and again at 180 is bent parallel to the plane of the body of the guide and upon the depressed end 181 and within the offset formed in the guide member is mounted a drum or pulley 182 provided with a groove 183 for the reception of the endless belt or cord 177. The latter, as may be here observed, is preferably a wire cable formed of a very fine wire for greater flexibility. At its other end and also beyond the travel of the tare weight the guide is provided with a hinged member 184 which depends from the end of the guide and supports a pulley 185 which serves as a guide for the lower run of the belt 177, there being a similar pulley 186 mounted upon the offset end 187 of the guide (see Fig. 3) for receiving the upper run of the belt. The pivoted member 184 is urged in a direction to keep the belt taut by a spring 188. A knob 189 is provided for turning the drum or pulley 182 and upon a flange 190 of the latter is inscribed a scale which is designed to indicate the counterbalancing effect of the tare weight at positions of the latter. A pointer 191 is suitably mounted to facilitate correct reading of the scale on the drum, and the cable is passed twice around the latter and secured at an intermediate position as at 192, Fig. 1, to prevent relative motion between the drum and the cable. It will be apparent that the drum and cable form a convenient and satisfactory means for adjusting the tare weight along the beam and the weight indication may be readily observed. The use of tare weights is so common that it is unnecessary to refer to their function further here.

A further feature of my invention relates to the dash-pot for preventing too abrupt movement of the beam. My dash-pot consists of a cylinder 193 having an enlarged upper end 194 and extending through and suitably attached to the base of the scale. A plunger 195 loosely fits the body of the dashpot and is connected by a rod 196 with the beam 5, the rod being bent at right angles for this purpose at its upper end as shown in Fig. 3 and inserted within a sleeve 197 upon the beam where it is secured by a set screw 198. The dash-pot is provided with a cap 199 having a sleeve 200 projecting from opposite sides thereof and surrounding the plunger rod. Near the upper end of the latter is secured a sleeve 201 which surrounds the upper end of the sleeve 200 and is closed at its upper end about the plunger rod to prevent the escape of the oil or other fluid used in the dashpot. The plunger consists of a perforated disk above which is an adjustable bell 202 of smaller diameter than the cylinder and the bell and disk are adjustable toward and from each other by a screw-threaded connection 203 to regulate the flow of liquid through the plunger. Upon the shoulder formed in the

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cylinder by the enlargement 194 rests a perforated splash plate 201 which is permitted some slight movement but whose upper position is limited by the depending sleeve upon the cap. By reason of this splash plate the upward motion of the piston is prevented from pumping or throwing the oil upwardly in such volume and with such velocity as to cause it to overflow or splash out of the dash-pot.

A further feature of my invention relates to securing the scale for shipment and is designed to prevent the injury or destruction of the bearings of the commodity receiver which frequently is occasioned by the jolts and jars to which a scale is subjected during shipment. For this purpose the spider which carries the bearings for the commodity receiver is formed with a transversely extending depending rib 205 and I provide a pair of plates 206, shown in detail in Fig. 13, which may be struck up out of sheet metal and formed near one end with a transverse groove to receive the rib 205 and provided near the other end with holes 206' so spaced and related to the cross groove 205 that, when the scale is prepared for shipment, the plates may be screwed upon the upper ends of the standards 2, using for this purpose the tapped openings by which the cover plates are secured and, when the screws are driven home, the outer ends of the plates bear against the ribs 205 and lift the bearings from the knives.

In order to prevent the breakage of the glass panes which cover the openings in the casing I form upon the inside of the frame members 24'—25' grooves 207 within which I place a fillet of suitable yielding material such as soft metal or putty against which the beveled edges of the plate glass which I employ bear, and the panes are held firmly but somewhat yieldingly in contact with the fillet by means of spring members 208 shown more particularly in Figs. 9 and 10, which are secured at their middle portions by screws 209 and bear at their ends upon the glass. By this means the panes are securely yet yieldingly held on both sides and breakage thereof is to a large extent prevented.

I have now described the various features of my invention in detail with reference to the specific form of scale in which they are here shown, but it will be understood that it is not limited to such form but only as pointed out in the following claims.

I claim:

1. In a pendulum scale, the combination with the scale beam and pendulum, a cone pivot upon the beam of a connection between the two comprising a stirrup, an adjustable seat on the stirrup for the cone pivot, a pin on the stirrup co-acting with the back of the beam to prevent the cone pivot leaving its socket and means whereby the adjustment of the socket likewise adjusts the position of the pin.

2. In a scale, the combination with a pendulum and a main beam, of a stirrup forming part of the connections therefor, a cone on the beam and an adjustable socket upon the stirrup co-acting therewith, a pin projecting from the stirrup into proximity to the top of the beam and a yoke connected to the adjustable socket and adapted to limit the projection of the pin.

3. In a pendulum scale and in combination with the beam and pendulum, a stirrup forming a part of the connections between the above mentioned parts, a cone upon the beam and an adjustable socket upon the stirrup adapted to receive the cone, a spring pressed pin arranged to be projected into proximity to the top of the beam and an adjustable yoke connected to the socket at one end and having in its other end a perforation through which the spring pressed pin extends.

4. In a pendulum scale, a pendulum comprising a weight and a rod, an enlarged hub upon the rod having a transverse bore, an arbor seated within the bore, a casting comprising a segment and a pair of cheek pieces, the latter embracing the rod head upon its opposite sides and bored to receive the arbor, screws extending through the pendulum rod head and bearing upon the casting upon opposite sides of the arbor for adjusting the segment with relation to the pendulum, and means for drawing the cheek pieces together to clamp the pendulum rod head in adjusted position.

5. In a pendulum scale, a pendulum comprising a weight and a rod, an enlarged hub upon the rod having a transverse bore, an arbor seated within the bore, a casting comprising a segment and a pair of cheek pieces, the latter embracing the rod head upon its opposite sides and bored to receive the arbor, screws extending through the pendulum rod head and bearing upon the casting upon opposite sides of the arbor for adjusting the segment with relation to the pendulum, a screw bolt passing through the cheek pieces and the pendulum rod head for clamping the parts in adjusted position.

6. In a pendulum scale, a pendulum and rod, the latter having an enlarged hub, with a transverse bore, an arbor extending through the bore having a cut out sector, and a knife extending longitudinally of the arbor within the cut out sector and extending beyond the ends of the arber.

7. In a pendulum scale, a pendulum and rod, the latter having an enlarged hub, with a transverse bore, an arbor extending through the bore having a cut out sector, and a knife extending longitudinally of the arbor within the cut out sector and extend-

25986

ing beyond the ends of the arbor, and means for clamping the knife in the arbor.

8. I: a pendulum scale, a pendulum and rod, the latter having an enlarged hub, having a transverse bore, an arbor extending through the bore having a cut out sector, and a knife extending longitudinally of the arbor within the cut out sector and beyond the ends of the arbor, and a screw bolt compressing the arbor upon the knife bl

CLARENCE H. HAPGOOD

Witnesses:
F. A. CROWLEY,
J. D. BURKHOLDER.

Copies of this patent may be obtained for five cents each, by addressing the "Commissioner of Pate
Washington, D. C."

1843 [Third Edition.]

(Coat of Arms.)

A. D. 1877, 11th January, No. 148.

Weighing Machines.

Letters Patent to John Greenwood, of the City of Manchester, in the County of Lancaster, Weighing Machine Maker, for the Invention of "Improvements in Self-indicating Weighing Machines."

Sealed the 10th July, 1877, and Dated the 11th January, 1877.

Complete Specification filed by the said John Greenwood at the Office of the Commissioners of Patents on the 11th January 1877.

John Greenwood, of the City of Manchester, in the County of Lancaster, Weighing Machine Maker. "Improvements in Self-indicating Weighing Machines."

The o jects of this Invention are to enable the weight on the weighing machine to be readily and accurately indicated on the dial, and to effectually check the vibration without detriment to its accuracy.

My improvements in self-indicating weighing machinery consists in connecting a suspending vibrating paddle, which is immersed in a semicircular box or tank containing water, mercury, or other fluid. The suspended paddle is in connection with a three-armed lever, which connects the weighing machine with the dial, the vibration of the dial being checked by the suspended paddle, and this arrangement can be fixed either below or above the dial, no springs being required.

The paddle is made to perform a portion of a revolution by means of the three-armed lever connecting the weighing machine with the dial, and to the end of one arm of the lever is fixed a rack which works a pinion fixed on the dial spindle, and the paddle working in the semicircular box or tank which contains the fluid is effectually checked from vibrating by the resistance of the fluid. To prevent back lash a strap is placed round the shaft of the pinion and
1844 connected to a weighted lever, which brings the teeth to bear at the same side at all times when at rest, and to one arm of the three armed lever can be attached a counter-balance for receiving weights to weigh heavier loads.

On the lower arm of the three armed lever is a weight for adjusting and balancing the machine, which weight may be raised or lowered by means of screws and nuts, and moved outwards or inwards by another screw from the side of the machine.

The objects of this Invention are to enable the weight on the weighing machine to be readily and accurately indicated on the dial,

and to effectually check the vibration without detriment to its accuracy.

The nature of my improvements will be readily understood by the following description thereof, reference being had to the figures and letters on the accompanying Sheet of Drawings, in which Fig. 1 is a plan, part in section; Fig. 2 a front view; and Fig. 3, a side view part in section.

In the various Figures *a* represents the box or frame work of the machine to which is connected a suspended vibrating paddle *b* balanced by the adjusting nut and screw *c*, the paddle being immersed in a semicircular box or tank *d* containing water, mercury, or other fluid. The suspended paddle *b* is in connection with a three-armed lever *e*, *f*, *g*, (the bearing or fulcrum being marked *h*) which connects the weighing machine with the dial, the vibration of the dial being checked by the suspended paddle *b*.

The paddle is made to perform a portion of a revolution by means of the three armed lever *e*, *f*, *g*, connecting the weighing machine with the dial, and to the end of one arm of the lever is fixed a rack *i*, which works a pinion *j* fixed on the dial spindle, and the paddle *b* working in the semicircular box or tank *d* which contains the fluid is effectively checked from vibrating by the resistance of the fluid.

To prevent back lash in the rack and pinion a strap *k* is placed round the shaft of the pinion *j* and connected to the weighted lever *k'* which encircles the dial spindle, which arrangement brings the teeth to bear at the same side at all times when at rest; and to one arm *f* of the three-armed lever can be attached a counterbalance for receiving weights to weigh higher numbers.

For ascertaining and denoting the tare I place a weight *l* on the *f* of the three-armed lever *e*, *f*, *g*. The weighted *m* on
1845 & 1846 lever *g* of the three-armed lever *e*, *f*, *g*, is for adjusting and balancing the machine, and can be raised and lowered by a screw *n* and nuts *o* for adjusting, and moved outwards or inwards for balancing by placing a key on the end of the screw *p*, and the rod *q* is to convey the weight from the platform to the three-armed lever.

This Invention is of great utility in weighing rapidly and accurately where continuous loads are passing over, as at colliery pit banks, railway depots, and other places where economy of time and labor are considered, as the weights are checked or read off without stoppage of traffic.

Having now described the nature and particulars of my said Invention, and the manner in which the same is to be performed, I desire it to be understood that I claim in self-indicating weighing machines,—

First. The suspended vibrating paddle *b* immersed in a box or tank *d* containing water or other fluid, as and for the purposes shewn and described.

Secondly. The three-armed lever *e*, *f*, *g*, as and for the purposes shewn and described.

2989

1847

A.D. 1847. Jan. 11. No. 148.
GREENWOOD'S Complete Specification.

1 SHEET

Fig 1

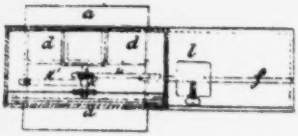


Fig 2.

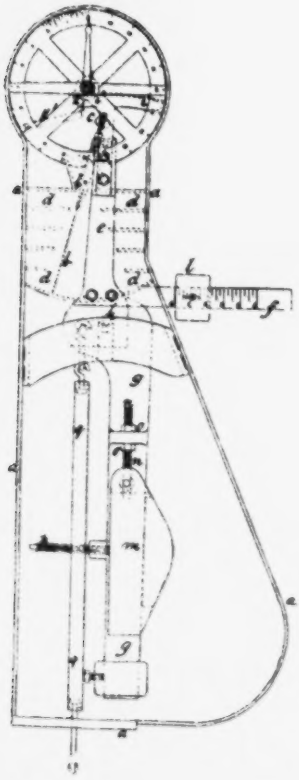
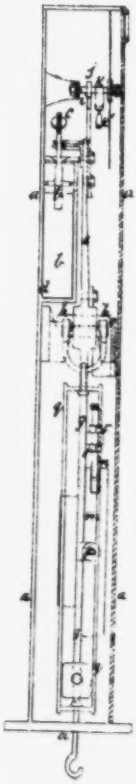


Fig 3



Thirdly. The sliding weight *m* for adjusting and balancing the machine, as shewn and described.

And, Fourthly. The weighted lever and arrangements connected therewith for dispensing with back lash in the rack and pinion, as shewn and described.

In witness whereof, I, the said John Greenwood, have hereunto set my hand and seal, this Twenty-eighth day of November, in the year of our Lord One thousand eight hundred and seventy-six.

JOHN GREENWOOD. [L. S.]

Redhill: Printed for His Majesty's Stationery Office, by Love & Malcomson, Ltd.

[Wt. 57—50/5/1910.]

1848 & 1849 [Second Edition.]

No. 5009. (Coat of Arms.) A. D. 1888.

Date of Application, 4th Apr. 1888.

Complete Specification Left 16th Aug., 1888.—Accepted 21st Sept., 1888.

Provisional Specification.

Improvements in Self-indicating Weighing Machines.

We, Joseph Cartwright of 13, Myrtle Terrace, Cross Lane, Salford, fitter and Joseph Wilbraham Cartwright of 35, Withington Street, Pendleton, Salford, in the County of Lancaster, pattern maker, do hereby declare the nature of this invention to be as follows:—

Our invention relates to that class of weighing machines known as self-indicating or pendulous lever weighing machines. In these a Tee shaped or double bell-crank lever is suspended on knife edges on the frame and the connecting rod from the transfer lever transferring the load on the weighing table to the machine is suspended on knife edges in one of the horizontal arms while the vertical arm is loaded with an adjustable weight. To the horizontal arms two graduated steel yards with sliding weights are fixed, one of which serves to indicate the tare of the tubs, corves, boxes, or vessels containing the coal or other articles to be weighed, while the other can be adjusted so that it balances the minimum net weight of coal or other contents ordinarily contained therein & the pendulous weights is used only to indicate the excess. This is ordinarily done by means of a finger moving in front of a graduated index sector and actuated by a pin in the pendulous lever fitting into a slot in the finger, which latter vibrates on a fulcrum fixed to the frame of the weighing machine.

This arangement causes the arcs through which the finger moves for equal increases of the load to vary and the divisions on the index sector to be unequal, and they have to be made experimentally after the machine is finished by loading the weighing table with
1850 standard weights. One of our improvements consists in arranging the index finger so that it vibrates on a fulcrum fixed to the pendulous vertical lever and prolonging it on the other side of the fulcrum and guiding the end in a straight or approximately straight line. For this purpose we attach by preference a bracket to the pendulous lever and support the index finger in it by means of centre pointed adjustable screws fitting into countersinks on the finger. The lower end of the finger we connect to a horizontal link vibrating on a fixed fulcrum, similar centre punch bearings being made use of for the joints. By this arrangement equal divisions on the index sector can be obtained for equal increases of the load within

the limits of weights for which such pendulous lever machines are constructed.

To the bottom of the pendulous lever we attach a paddle working in a cistern containing water for the purpose of Stopping undue vibration of the lever and bringing the same sooner to a state of rest.

When the taring and minimum sliding weights are at zero on their steel yards, the finger must also be at zero on the index sector and for this purpose ordinarily a further weight has to be adjusted upon the transfer lever. To obviate this we fix the two steel yards to brackets adjustable on the horizontal arms of the pendulous lever or otherwise make the steel yards adjustable on the horizontal arms, instead of fixing them immoveably as usual. By moving the steel yards with their weights bodily along the horizontal arms the machine can be balanced as required.

Dated this 3rd day of April 1888.

EMMOTT & CO.,
Agents for the Applicants.

1851 *Complete Specification.*

Improvements in Self-indicating Weighing Machines.

We, Joseph Cartwright of 13, Myrtle Terrace, Cross Lane, Salford, fitter and Joseph Wilbraham Cartwright of 35, Withington Street, Pendleton, Salford, in the County of Lancaster pattern maker, do hereby declare the nature of this invention and in what manner the same is to be performed, to be particularly described and ascertained in and by the following statement:—

Our invention relates to that class of weighing machine known as self-indicating or pendulous lever weighing machines. In these a Tee shaped or double bellcrank lever is suspended on knife edges on the frame and the connecting rod from the transfer lever transferring the load on the weighing table to the machine is suspended on knife edges in one of the horizontal arms, while the vertical arm is loaded with an adjustable weight. To the horizontal arms two graduated steelyards with sliding weights are fixed, one of which serves to indicate the tare of the tubs corves, boxes or vessels containing the coal or other articles to be weighed, while the other can be adjusted so that it balances the minimum net weight of coal or other contents ordinarily contained therein and the pendulous weight is only used to indicate the excess. This is ordinarily done by means of a finger vibrating in front of a graduated index sector and actuated by a pin in the pendulous lever fitting into a slot in the finger, which latter vibrates on a fulcrum fixed to the frame of the weighing machine. This arrangement causes the arcs through which the finger moves for equal increases of the load and the divisions on the index sector to be unequal, and they have to be made experimentally after the machine is finished by loading the weighing table with standard weights. The object of our invention is to obviate this inconve-

nience by connecting the index figure to the pendulous lever in such a manner that the divisions on the graduated sector become equal for equal increases of the load.

On the drawing appended hereunto figure 1 shows a front view, fig. 2 a side view and fig. 3 a top view of a self-indicating
1852 weighing machine fitted with our improved arrangement, figs. 4 and 5 showing details.

a is the frame or pillar of the machine upon which the Tee shaped lever *b* b^1 b^2 is suspended with knife edges a^1. This lever is shewn made in three parts for convenience of manufacture, the horizontal beam *b* being formed with a short vertical arm b^3 to which the vertical bars b^1 and b^2 are attached by screws, one bar at the front and the other at the back of the pillar *a*, but these bars may be welded to the horizontal beam or attached in any other ordinary suitable way. The arms b^1 and b^2 form the vertical pendulous lever hereinbefore referred to. To the former the adjustable weight *c* is attached; *d* is the connecting rod suspended upon knife edges d^1 in the lever *b*, which connects the transfer lever receiving or supporting the load on the weighing table to the machine. *e* and *f* are the two steelyards attached to the horizontal part *b* of the pendulous lever, the upper steelyard carrying the sliding weight e^1 which is adjusted so as to balance the minimum net weight of material to be weighed, while the lower steelyard *f* carries the sliding weight f^1 which is adjusted to balance the tare of the receptacles for the material to be weighed. *g* is the index sector and *h* a finger indicating the excess of weight over the minimum net weight. These parts are similar to those ordinarily used and form no part of our invention.

Ordinarily the finger *h* is arranged to vibrate on a fulcrum fixed to the pillar *a* and is actuated by a pin in the pendulous lever b^1, or b^2 fitting into a slot of the finger *h*, whereby the inconveniences herein before described are produced. Our improvement consists in arranging the finger so that it vibrates on a fulcrum fixed to the pendulous lever and prolonging the finger to the other side of the fulcrum and guiding the end in a straight or approximately straight line. As shewn on the drawing, we fix upon the pendulous lever b^2 a stud *i* with a knife edge i^1 on which the finger *h* vibrates, the finger being formed with an opening h^1 into which a steel plate h^2 is inserted and rests upon the knife edge i^1, as is shewn in detail by fig. 4.

The lever *h* is connected at its lower end h^3 to a rod *k* with forked end k^1 by a pin or equivalent means. A bracket *l* bolted to the arm *m* cast or attached to the pillar *a* has a ring *n* bolted to it, the inner edge of which is knife shaped at the front and serves as ful-
1853 crum to the rod *k* hooked upon it as shewn in detail by fig. 5. The other end of the rod *k* connected to the finger *h* is arranged to be vertically below the knife edges on the pillar *a* supporting the pendulous lever. The steelyards *e* and *f* are carried by carriers b^4 b^5 arranged to clip the horizontal arm *b* of the pendulous lever and adjustable on the same, by means of which arrangement the steelyards can be shifted on said arm so that when the table of the weighing machine is not loaded and the weights e^1 and f^1 are put

at zero, the pendulous lever and finger h are in the positions shewn on the drawing with the finger at zero, and the use of additional weights on the transfer lever to effect this adjustment is hereby obviated. On the weight e^1 being set to the minimum weight of material to be contained in the receptacles to be weighed and the weight f^1 to balance the tare, the finger will also be at zero when a receptacle containing this weight is on the weighing table, and additional weights in the receptacle will cause the finger to move to the right and indicate the excess. The divisions for equal increases of the load will be equal, as the lengths of the arms of the finger do not vary in different positions of the pendulous lever, as is the case when the finger vibrates on a fulcrum fixed to the pillar a and is moved by a pin on the lever b^1 or b^2 working in a slot of the finger, or a pin on the finger working in a slot in the lever b^1 or b^2.

The end of the lever arm b^1 has attached to it a paddle o working in a cistern o^1 containing liquid for the purpose of obviating or reducing oscillations of the pendulous lever. A sliding weight p is arranged on the lever arm b to balance variations in the weight of the weighing table or platform caused by changes in the weather or collection of rain on the same.

Instead of the knife edged fulcra used for the rod k and finger h centre pointed adjustable pins or screws placed opposite each other in one of the parts and fitting into counter sinks on the other part may be used. It is obvious that the finger h may be arranged to vibrate in front of the pillar a and be actuated by the arms b^1 instead of being placed at the back as shewn and actuated by the arm b^2.

Having now particularly described and ascertained the nature of our said invention and in what manner the same is to be performed, we declare that what we claim is,

1854 In selfindicating weighing machines arranging the index finger h so that it vibrates on a fulcrum i upon the pendulous lever and prolonging the finger to the other side of said fulcrum and guiding the end h^3 in an approximately straight vertical line by means of a link k, substantially as herein before described and illustrated.

Dated this 15th day of August 1888.

EMMOTT & CO.,
Agents for the Applicants.

Redhill: Printed for His Majesty's Stationery Office, by Love & Malcomson, Ltd.
[Wt. 57—50/5/1910.]

3997

A.D. 1888. April 4. N° 5009.

J. & J. W. CARTWRIGHT'S Complete Specification. 1 SHEET

2nd Edition]

1855

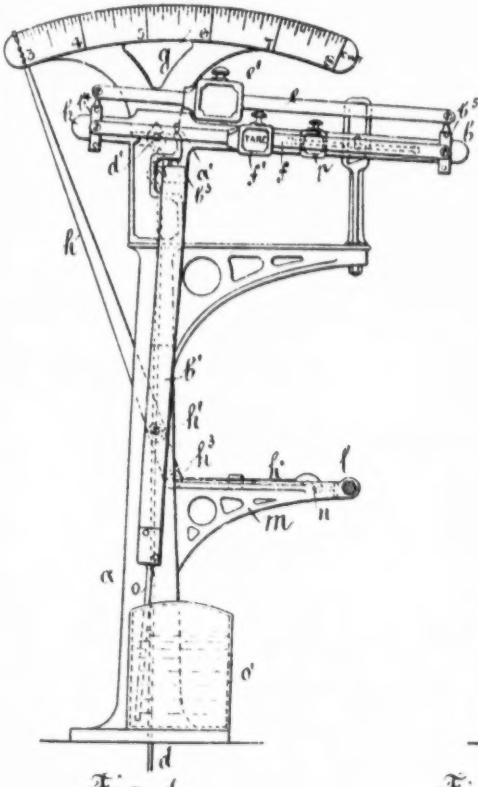


Fig. 1.

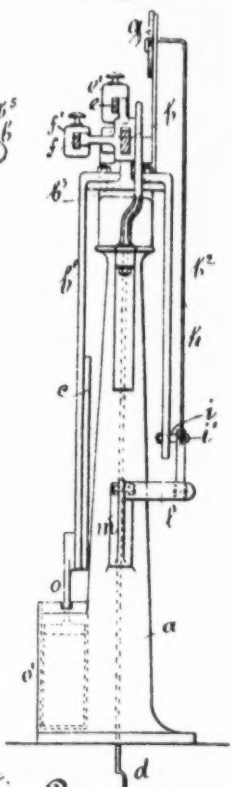


Fig. 2.

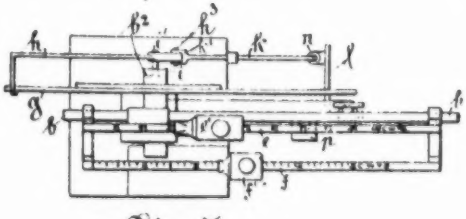


Fig. 3.

Fig. 4.

Fig. 5.

[This drawing is an exact reduction of the original instrument as deposited at the Patent Office.]

3998

1857

PRICE LIST

OF

TOLEDO
Computing Scales

FOR

UNITED STATES

No. 11

FILED
MAY 6 1918
.....O'CLOCK.....M.
J. C. MacMillan
CLERK

Taking Effect February 15th, 1909

Pl. Ex: 2, 3, 4, 5, 6, 41, 42.

	Blue Finish	Gold Finish
(a) No. 346	$140.00	$155.00

Capacity 24 pounds.

Cylinder chart.

Without tare beam.

Ornamental brass trimmings.

Removable dash-pot.

Lock-nut leveling screws.

Mechanism handsomely finished and visible to both customer and merchant through large glass-covered openings in housing.

Housing practically dust-proof.

PLATTER (oval plate glass).

Prices per pound as follows:
4, 5, 6, 7, 7½, 8, 8½, 9, 9½, 10, 11, 12, 12½, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 35.

Money values on the chart are shown by figures for every cent at prices per pound from 4c. to 9c. inclusive, and by figures for every other cent with a line graduation for intermediate cents at prices per pound from 9½c. to 19c. inclusive. From 20c. to 35c. per pound inclusive every 5c. in value is shown by a figure, line graduations representing intermediate cents.

	Blue Finish	Gold Finish
(a) No. 347	$140.00	$155.00

Capacity 20 pounds.

Cylinder chart.

Without tare beam.

Ornamental brass trimmings.

Removable dash-pot.

Lock-nut leveling screws.

Mechanism handsomely finished and visible to both customer and merchant through large glass-covered openings in housing.

Housing practically dust-proof.

PLATTER (oval plate glass).

Prices per pound as follows:
5, 6, 7, 8, 9, 10, 11, 12, 12½, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35.

Money values on chart are shown by figures for every cent at prices per pound from 5c. to 17c. inclusive, and by figures for every other cent with a line graduation for intermediate cents at prices per pound from 18c. to 35c. inclusive.

For Idea Bl. Ex. No. 3.
Allen. 13, 1915. C.B.M.
Submitted June 29, 1916

	Blue Finish	Gold Finish
(a) No. 348	$140.00	$155.00

Capacity 15 pounds.

Cylinder chart.

Without tare beam.

Ornamental brass trimmings.

Removable dash-pot.

Lock-nut leveling screws.

Mechanism handsomely finished and visible to both customer and merchant through large glass-covered openings in housing.

Housing practically dust-proof.

PLATTER (oval plate glass).

Prices per pound as follows:
10, 11, 12, 12½, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40.

Money values on chart are shown by figures for every cent at prices per pound from 10c. to 20c. inclusive, and by figures for every other cent with line graduations for intermediate cents at prices per pound from 21c. to 40c. inclusive.

For Idea. Pl. Ex. No. 8. Dec. 13-1915: C.B.M. Column dat June 27, 1916

3002

	Blue Finish	Gold Finish
(a) No. 349.....	$140.00	$155.00

Automatic Gross Weight, Net Weight and Tare Weight Scale.

Capacity 30 pounds.

Cylinder chart.

Ornamental brass trimmings.

Removable dash-pot.

Lock-nut leveling screws.

Mechanism handsomely finished, exposed to view through glass-covered openings.

Housing practically dust-proof.

PLATTER (oval plate glass).

Tare weights as follows:
3 lbs., 3 lbs. 2 oz., 3 lbs. 4 oz., 3 lbs. 6 oz., 3 lbs. 8 oz., 3 lbs. 10 oz., 3 lbs. 12 oz., 3 lbs. 14 oz., 3 lbs. 15 oz., 4 lbs., 4 lbs. 2 oz., 4 lbs. 4 oz., 4 lbs. 6 oz., 4 lbs. 7 oz., 4 lbs. 8 oz., 4 lbs. 9 oz., 4 lbs. 10 oz., 4 lbs. 11 oz., 4 lbs. 12 oz., 4 lbs. 14 oz., 5 lbs., 5 lbs. 2 oz., 5 lbs. 4 oz., 5 lbs. 6 oz., 5 lbs. 8 oz.

Gross weight and net weight chart graduated to ounces.

	Blue Finish	Gold Finish
(a) No. 350	**$140.00**	**$155.00**

Automatic Gross Weight, Net Weight and Tare Weight Scale.

Capacity 50 pounds.

Cylinder chart.

Ornamental brass trimmings.

Removable dash-pot.

Lock-nut leveling screws.

Mechanism handsomely finished, exposed to view through glass-covered openings.

Housing practically dust-proof.

PLATTER (oval plate glass).

Tare weights as follows:

5 lbs., 5 lbs. 4 oz., 5 lbs. 8 oz., 5 lbs. 12 oz., 6 lbs., 6 lbs. 4 oz., 6 lbs. 8 oz., 6 lbs. 12 oz., 7 lbs., 7 lbs. 4 oz., 7 lbs. 8 oz., 7 lbs. 12 oz., 8 lbs., 8 lbs. 4 oz., 8 lbs. 12 oz., 9 lbs., 9 lbs. 4 oz., 9 lbs. 8 oz., 9 lbs. 12 oz., 10 lbs., 10 lbs. 4 oz., 10 lbs. 8 oz., 10 lbs. 12 oz., 11 lbs.

Gross weight and net weight chart graduated to ounces.

For Sales Off. Ex. No. 6
Dec. 13, 1915. E.B.M.
Submitted June 27, 1916.

		Blue Finish	Gold Finish
(c)	**No. 81**	**$100.00**	**$115.00**

*Capacity 20 pounds.
Cylinder chart.
Without tare beam.
Nickel trimmings.
Lock-nut leveling screws.
PLATTER (oval opaque glass).
Prices per pound as follows:
4, 5, 6, 7, 7½, 8, 8¼, 9, 9½, 10, 11, 12, 12½, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 32.
Money values on the chart are shown by figures for every cent at prices per pound from 4c. to 16c. inclusive, and by figures for every other cent, with a line graduation for intermediate cents at prices per lb. from 17c. to 32c. inclusive.

		Blue Finish	Gold Finish
(c)	**No. 82**	**$100.00**	**$115.00**

*Capacity 20 pounds.
Cylinder chart.
Without tare beam.
Nickel trimmings.
Lock-nut leveling screws.
PLATTER (oval opaque glass).
Prices per pound as follows:
5, 6, 7, 8, 9, 10, 11, 12, 12½, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35.
Money values on chart are shown by figures for every cent at prices per pound from 5c. to 17c. inclusive, and by figures for every other cent with a line graduation for intermediate cents at prices per pound from 18c. to 35c. inclusive

*Nos. 81 and 82 will be ready for delivery in 60 days.

Plaintiff's Exhibit No. 7. 1871

For Iden.

PL. EX. 7.

Dec. 13, 1915. C. B. M., Admitted June 27, 1916.

ADVANCE NOTICE OF REVISED PRICE LIST

To Take Effect July 1st, 1910

Scales shown below bearing old numbers will be just as described under the same numbers in Price List No. 12, except in so far as other description is here given.

The manufacture of all other scales bearing old style numbers will be discontinued.

CLASS A	Blue Finish	Gold Finish
(a) Nos. 210-211-212	$ 70.00	$ 75.00
(a) Nos. 223-224-225	85.00	90.00
(a) Nos. 226-227-228	100.00	105.00
(a) Nos. 243-244-245	100.00	105.00
(a) Nos. 246-247-248	115.00	120.00
(a) Nos. 253-254-255	110.00	115.00
(a) Nos. 256-257-258	125.00	130.00
(a) Nos. 273-274-275	110.00	115.00
(a) Nos. 276-277-278	125.00	130.00
(a) No. 381 (Cylinder) Charts A, B, C, D, E.	$150.00	$160.00
(a) No. 382 (Elevated Cylinder) Charts A, B, C, D, E, G, H, I, J, K.	$160.00	$170.00
(a) No. 383 (Electric) (Ready in 60 days) Charts A, B, C, D, E.	$175.00	$185.00
(a) No. 384 Electric (Elevated Cylinder) (Ready in 60 days) Charts A, B, C, D, E, G, H, I, J, K.	$185.00	$195.00
(a) No. 385 Cylinder (smaller) (Ready July 1st) Chart F.	$130.00	$140.00
(a) No. 386 Elevated Cylinder (smaller) (Ready July 1st) Chart F.	$140.00	$150.00
(a) No. 387 Electric (Cylinder, smaller) (Ready in 60 days) Chart F.	$155.00	$165.00
(a) No. 388 Electric (Elevated Cylinder, smaller) (Ready in 60 days) Chart F.	$165.00	$175.00

CLASS B	Blue Finish	Gold Finish
(b) Nos. 110-111-112	$55.00	$60.00
(b) Nos. 123-124-125	70.00	75.00
(b) Nos. 113-114-115	65.00	70.00

5 lbs. in black on chart.
Without tare beam.
Prices per lb., 10c to 60c.
Housing closed.
Pendulum exposed to view through glass-covered openings, front and back.

CLASS B—Continued.

		Blue Finish	Gold Finish
(b)	Nos. 116-117-118	$70.00	$75.00

5 lbs. in black on chart.
With 5-lb. tare beam.
Without red weight.
Prices per lb., 10c. to 60c.
Housing closed.
Pendulum exposed to view through glass covered openings, front and back.

		Blue Finish	Gold Finish
(b)	Nos. 134-135-136	$65.00	$70.00

5 lbs. in black on chart.
Without tare beam.
Prices per lb., 5c. to 40c.
Housing closed.
Pendulum exposed to view through glass-covered openings, front and back.

		Blue Finish	Gold Finish
(b)	Nos. 137-138-139	$70.00	$75.00

5 lbs. in black on chart.
With 5-lb. tare beam.
Prices per lb., 5c. to 40c.
Housing closed.
Pendulum exposed to view through glass-covered openings, front and back.

		Blue Finish	Gold Finish
(b)	Nos. 146-147-148	$75.00	$80.00

10 lbs. in black on chart.
10-lb. tare beam.
Prices per lb., 5c. to 40c.
Housing closed.
Pendulum exposed to view through glass-covered openings, front and back.

		Blue Finish	Gold Finish
(b)	Nos. 156-157-158	$85.00	$90.00

10 lbs. in black on chart.
10-lb. tare beam.
10 lbs. on weight beam.
Prices per lb., 5c. to 40c.
Housing closed.
Pendulum exposed to view through glass-covered openings, front and back.

		Blue Finish	Gold Finish
(b)	Nos. 104-105-106	$40.00	$45.00
(b)	Nos. 107-108-109	40.00	45.00
(b)	Nos. 131-132-133	80.00	85.00
(b)	Nos. 143-144-145	80.00	85.00
(b)	Nos. 153-154-155	90.00	95.00
(b)	Nos. 173-174-175	90.00	95.00

CLASS B—Continued.

	Olive Green Finish	Blue Finish	Gold Finish
(b) No. 181 (Cylinder)..... Charts A, B, C, D, E.	$130.00	$135.00	$140.00
(b) No. 182 (Elevated Cylinder)..... Charts A, B, C, D, E, G, H, I, J, K.	145.00	150.00	155.00
(b) No. 183 (Electric)..... (Ready in 60 days) Charts A, B, C, D, E.	155.00	160.00	165.00
(b) No. 184 Electric (Elevator Cylinder)..... (Ready in 60 days) Charts A, B, C, D, E, G, H, I, J, K.	170.00	175.00	180.00
(b) No. 185 Cylinder (smaller)..... (Ready July 1st) Chart F.	110.00	115.00	120.00
(b) No. 186 Elevator Cylinder (smaller)..... (Ready July 1st) Chart F.	125.00	130.00	135.00
(b) No. 187 Electric (Cylinder, smaller)..... (Ready in 60 days) Chart F.	135.00	140.00	145.00
(b) No. 188 Electric (Elev. Cyl., smaller)..... (Ready in 60 days) Chart F.	150.00	155.00	160.00

CLASS C	Olive Green Finish
(c) No. 81 (Cylinder)..... Charts A, B, C, D, E.	$110.00
(c) No. 82 (Elevated Cylinder)..... Charts A, B, C, D, E, G, H, I, J, K.	125.00
(c) No. 83 (Electric)..... (Ready in 60 days) Charts A, B, C, D, E.	135.00
(c) No. 84 Electric (Elevated Cylinder)..... (Ready in 60 days) Charts A, B, C, D, E, G, H, I, J, K.	150.00
(c) No. 85 Cylinder (smaller)..... (Ready July 1st) Chart F.	95.00
(c) No. 86 Elevated Cylinder (smaller)..... (Ready July 1st) Chart F.	110.00
(c) No. 87 Electric (Cylinder smaller)..... (Ready in 60 days) Chart F.	120.00
(c) No. 88 Electric (Elevated Cylinder, smaller)..... (Ready in 60 days) Chart F.	135.00

EXCHANGES

Allowances will remain the same as in Price List No. 12, excepting as follows:

Allowance C—To apply on the sale of any Toledo scale the price of which is not less than $80.00.

Allowance D—To apply on the sale of any Toledo scale the price of which is not less than $125.00.

Allowance E—Abandoned.

Allowance F—To apply on the sale of any Toledo scale the price of which is not less than $150.00.

Allowance G—$35.00 to apply on the sale of any Toledo scale the price of which is not less than $90.00.

$40.00 to apply on the sale of any Toledo scale the price of which is not less than $110.00.

$45.00 to apply on the sale of any Toledo scale the price of which is not less than $150.00.

Allowance H—To apply on the sale of any Toledo scale the price of which is not less than $110.00.

ALLOWANCES ON TOLEDO SCALES

The allowance percentage shall be based on the lower-priced scale in the transaction.

25% on scales serial number less than 20,000.

35% on scales serial number between 20,000 and 40,000.

50% on scales serial number above 40,000.

TOLEDO COMPUTING SCALE COMPANY

Makers of Honest Scales Toledo, Ohio, U. S. A.

Plaintiff's Exhibit No. 40. 1875

Duplicate.

TOLEDO COMPUTING SCALE COMPANY

Statement of Profits—Cylinder Scales
1906 - 1912.

Marwick, Mitchell, Peat & Co.
Chartered Accountants

SUMMARY

TOLEDO COMPUTING SCALE COMPANY

SUMMARY OF PROFITS ON MANUFACTURE AND SALE OF CYLINDER SCALES

From January 1, 1906 to August 31, 1912.

(As set forth in Statements attached hereto)

	Basis No. "1"	Basis No. "2"	Basis No. "3"	Basis No. "4"
United States:				
On Sales	$459,206.77	404,629.48	583,340.10	529,257.88
On Inventory of Completed Scales at Average Profit per Scale	40,549.95	35,731.77	51,510.39	46,747.38
Total United States	499,756.72	440,361.25	634.850.49	576,005.26
Canada:				
On Sales*	56,141.24	56,141.24	56,141.24	56,141.24
On Inventory—Not known	.....	.....	.....	.....
Total Canada	56,141.24	56,141.24	56,141.24	56,141.24
Total	$555,897.96	496.502.49	690,991.73	632,146.50

*This basis does not change.

No note is taken of parts on hand and of scales and parts in course of manufacture at the close of the period under consideration.

Plaintiff's Exhibit No. 40. 1877

TOLEDO COMPUTING SCALE COMPANY

STATEMENT OF PROFITS ON MANUFACTURE AND SALE OF CYLINDER SCALES FROM JANUARY 1, 1906 TO AUGUST 31, 1912, PREPARED ON FOLLOWING BASES.

Basis No. "1" Of charging Cost of Manufacture on Net number of Scales sold, that is, after deduction of "Charges to Sales and Charge Backs".

Basis No. "2" Of charging Cost of Manufacture on Gross number of Scales Sold, thereby disregardung returns known as "Charges to Sales and Charge Backs".

Basis No. "3" As outlined in Basis No. "1", after adjustment of Experimental, Development and Organization Charges, applying a proportion of same to operations subsequent to August 31, 1912.

Basis No. "4" As outlined in Basis No. "2", after adjustment of Experimental, Development and Organization Charges, applying a proportion of same to operations subsequent to August 31, 1912.

	Basis No. "1"	Basis No. "2"	Basis No. "3"	Basis No. "4"
United States:				
Year ended December 31, 1906	$ 555.96	511.55	839.45	796.74
Year ended December 31, 1907	23,707.77	22,389.13	29,445.03	28,143.33
Year ended December 31, 1908	58,543.49	54,717.51	71,389.60	67,612.67
Year ended December 31, 1909	100,759.24	92,815.20	116,452.51	108,607.12
Year ended December 31, 1910	106,191.93	92,656.70	135,509.07	122,094.28
Year ended December 31, 1911	95,679.43	77,786.97	136,969.33	119,145.39
Eight months ended August 31, 1912	73,768.95	63,752.42	92,735.11	82,858.35
Total	$459,206.77	404,629.48	583,340.10	529,257.88

Statement of Profits on Manufacture and Sale of Cylinder Scales, as above, reduced to a "Per Scale" sold basis on Net Sales.

	No. of Scales Sold	Basis No. "1"	Basis No. "2"	Basis No. "3"	Basis No. "4"
Year ended December 31, 1906	55	$10.11	9.30	15.26	14.49
Year ended December 31, 1907	1,159	20.46	19.32	25.41	24.28
Year ended December 31, 1908	3,052	19.18	17.93	23.39	22.15
Year ended December 31, 1909	3,929	25.64	23.62	29.64	27.64
Year ended December 31, 1910	5,060	20.99	18.31	26.78	24.13
Year ended December 31, 1911	4,675	20.47	16.64	29.30	25.49
Eight minths ended August 31, 1912	2,894	25.49	22.03	32.04	28.63
Total and Average	20,824	$ 22.05	19.43	28.01	25.42

In addition to the Sales included in the above statement the Company had on hand at September 3, 1912, 1,839 Cylinder Scales, as testified to by witness William Zolg (Defendant's Exhibit page 18). No note is taken of scales or parts in course of manufacture at August 31 or September 3, 1912.

Canada

Estimate of profit on manufacture of Cylinder Scales sold through or by The Toledo Scale Company i Canada, based upon the average rate of profit on all sales.

	Sales					Profit per Scale Sold	
	Total	Cylinder	Per Cent	Total Profit	Cylinder	Sold	Averag Profi
Year ended December 31, 1908	$15,262.50	10,610.00	69.52	$ 6,317.67	4,392.04	64	$63.6
Year ended December 31, 1909	77,667.41	48,924.50	63.00	15,754.42	9,925.28	320	31.0
Year ended December 31, 1910	107,911.92	73,358.35	67.98	20,097.70	13,662.41	460	29.7
Year ended December 31, 1911	149,644.23	97,798.51	65.35	26,062.32	17,031.73	621	27.4
Eight Months ended August 31, 1912	108,960.00	67,190.45	61.67	18,047.31	11,129.78	397	28.0
Total and Average	$459,446.06	297,881.81		$86,279.42	56,141.24	1,862	$30.1

No particulars have been ascertained of the inventory of parts and cylinder scales on hand or in cou of manufacture at August 31 or September 3, 1912.

Plaintiff's Exhibit No. 40. 1879

BASIS No. 1

TOLEDO, COMPUTING SCALE COMPANY

PROFIT ON MANUFACTURE AND SCALE OF CYLINDER SCALES
For the year ended December 31, 1906.

Based upon evidence submitted by William Slater and William Zolg and other witnesses for the Plaintiff, The Computing Scale Company, and on statements of accounts prepared by Defendant and produced by witness Zolg.
This statement is prepared on basis of charging cost of manufacture on net number of scales sold, that is, after deduction of "Charges to Sales and Charge Backs".

Sales of Cylinder Scales:			
Original Sales	57 Scales		$5,760.00
Deduct: Charges to Sales	2 "		216.00
Net	55 "		5,544.00

Deduct Cost of Cylinder Scales Sold:

Type Number	Number Sold	Cost—Labor and Material per Scale		
300	55	$14.86	$ 817.30	
Note: This cost is based on figure adopted in the year ended December 31, 1911—See Zolg's Testimony.				
Add Overhead Expense 49.42% of Combined Labor and Material, ascertained as follows:			403.91	
Labor—Direct		$ 45,479.71		
Material		34,706.39		
		80,186.10		
Divided into aggregate of Indirect Labor and Factory Expense		39,631.03		
			1,221.21	
Commission to Agents—31.73% of Sales, being ratio of total Commissions to total Sales			1,759.11	
Commercial and Selling Overhead:				
Total Commercial and Selling Overhead		302,541.38		
From which deduct:				
Commission to Agents	$ 154,734.45			
Bond Interest	3,600.01			
Interest	1,235.41	159,569.87		
Net Commercial and Selling Overhead		142,971.51		
of which chargeable against Cylinder Scales—1.14% Cylinder Sales as above, $5,544.00, or 1.14% of total Sales, amounting to $487,609.76.			1,629.88	
Losses on Agents' and Customers' Accounts—3% of Sales			166.32	
Allowances for Exchange Scales, net—$18,554.45, of which 1.14% applies on Sales of Cylinder Scales			211.52	4,988.04
Profit on Manufacture and Sales of Cylinder Scales, before charging Interest				$ 555.96

TOLEDO COMPUTING SCALE COMPANY

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES
For the year ended December 31, 1907.

Based upon evidence submitted by William Slater and William Zolg and other witnesses for the Plaintiff, The Computing Scale Company, and on statements of accounts prepared by Defendant and produced by witness Zolg.
This statement is prepared on basis of charging cost of manufacture on net number of scales sold, that is, after deduction of "Charges to Sales and Charge Backs".

Sales of Cylinder Scales:				
Original Sales	1,221 Scales			$ 154,758.00
Deduct: Charges to Sales	62 "			6,922.00
Net	1,159 "			147,836.00
Sales of Second-hand Scales—Proportion 26% of $850.00				221.00
Total Cylinder Sales				148,057.00
Deduct Cost of Cylinder Scales Sold:				
Type Number	Number Sold	Cost—Labor and Material Per Scale	Amount	
300	106	$14.86	1,575.16	
344	789	14.86	11,724.54	
345	171	14.75	2,522.25	
346	93	14.86	1,381.98	
	1,159			17,203.93
Note: These costs are based on figures adopted in the year ended December 31, 1911—See Zolg's Testimony.				
Add Overhead Expense 43.16% of Combined Labor and Material, ascertained as follows:				7,425.22
Labor—Direct			62,225.76	
Material			66,290.87	
			128,516.63	
Divided into aggregate of Indirect Labor and Factory Expense			55,475.80	
				24,629.15
Commission to Agents—34.2% of Sales, being ratio of total Commissions to total Sales				50,635.49
Commercial and Selling Overhead:				
Total Commercial and Selling Overhead			346,273.98	
From which deduct:				
Commission to Agents	$ 194,757.15			
Bond Interest	5,087.51			
Interest	629.32		200,473.98	
Net Commercial and Selling Overhead..			145,800.00	
of which chargeable against Cylinder Scales—26% Cylinder Sales as above, $148,057.00, or 26% of total Sales amounting to $569,528.84.				37,908.00
Carried Forward				$ 113,172.64 148,057.00

Plaintiff's Exhibit No. 40. 1881

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES
—Continued.

Brought Forward		$ 113,172.64	148,057.00
Losses on Agents' and Customers' Accounts—3% of Sales		4,441.71	
Depreciation on Buildings—Allowance same as claimed by Company in 1911		303.13	
Allowances for Exchange Scales: Exchange Scale Allowances	$ 24,737.50		
of which 26% is chargeable to this account		6,431.75	124,349.23
Profit on Manufacture and Sale of Cylinder Scales, before charging interest			$ 23,707.77

TOLEDO COMPUTING SCALE COMPANY

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES
For the year ended December 1, 1908.

Based upon evidence submitted by William Slater and William Zolg and other witnesses for the Plaintiff, The Computing Scale Company, and on statements of accounts prepared by Defendant and produced by witness Zolg.
This statement is prepared on basis of charging cost of manufacture on net number of scales sold, that is, after deduction of "Charges to Sales and Charge Backs."

Sales of Cylinder Scales:				
Original Sales	3,235 Scales			$459,372.50
Deduct: Charges to Sales	183 "			22,295.75
Net	3,052 "			437,076.75
Sales of Second-hand Scales—Proportion 51.66% of $21,647.10				11,182.89
Total Cylinder Sales				448,259.64

Deduct Cost of Cylinder Scales Sold:

Type Number	Number Sold	Cost—Labor and Material Per Scale	Amount		
300	*3*	*$14.86*	*44.58*		
344	1	14.86	14.86		
345	1,505	14.75	22,198.75		
346	1,166	14.86	17,326.76		
347	316	14.86	4,695.76		
348	53	14.86	787.58		
349	7	14.86	104.02		
350	3	14.86	44.58		
Spcl. Cyl. 30	4	14.86	59.44		
	3,052			45,187.17	

Note: These costs are based on figures adopted in the year ended December 31, 1911 —See Zolg's Testimony.

Add Overhead Expense 31.19% of Combined Labor and Material, ascertained as follows:		18,612.60	
Labor—Direct	76,663.95		
Material	71,850.68		
	148,514.63		
Divided into aggregate of Indirect Labor and Factory Expense	61,168.76		
Commission to Agents—38.39% of Sales, being ratio of total Commissions to total Sales		63,799.77	
		172,086.82	
Carried Forward		$235,886.59	448,259.64

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued.

Brought Forward			$235,886.59	448,259.64
Commercial and Selling Overhead:				
Total Commercial and Selling Overhead		$531,001.93		
From which deduct:				
Commission to Agents	$333,080.41			
Bond Interest	4,999.99			
Interest	4,671.86	342,752.26		
Net Commercial and Selling Overhead		188,249.67		
of which chargeable against Cylinder Scales—51.66%			97,249.78	
Cylinder Sales as above, $448,259.64, or 51.66% of total Sales, amounting to $867,724.99.				
Losses on Agents' and Customers' Accounts—3% of Sales			13,447.79	
Depreciation on Buildings—Allowance same as claimed by Company in 1911			303.13	
Allowances for Exchange Scales:				
Exchange Scale Allowances		82,905.26		
of which 51.66% is chargeable to this account			42,828.86	389,716.15
Profit on Manufacture and Sales of Cylinder Scales, before charging interest				$58,543.49

TOLEDO COMPUTING SCALE COMPANY

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES
For the year ended December 31, 1909.

Based upon evidence submitted by William Slater and William Zolg and other witnesses for the Plaintiff, the Computing Scale Company, and on statements of accounts prepared by Defendant and produced by witness Zolg.

This statement is prepared on basis of charging cost of manufacture on net number of scales sold, that is, after deduction of "Charges to Sales and Charge Backs".

Sales of Cylinder Scales:			
Original Sales	4,323	Scales	$ 605,466.41
Deduct: Charges to Sales and Charge Backs	394	"	49,358.33
Net	3,929	"	556,108.08
Sales of Second-hand Scales—Proportion 48.8% of $48,345.70			23,592.70
Total Cylinder Sales			579,700.78

Deduct Cost of Clyinder Scales Sold:

Type Number	Number Sold	Cost—Labor and Material Per Scale	Amount	
81	34	$14.86	505.24	
82	172	14.86	2,555.92	
83	34	14.86	505.24	
84	5	14.86	74.30	
85	4	14.86	59.44	
86	3	14.86	44.58	
181	16	14.86	237.76	
182	57	14.86	847.02	
183	15	14.86	222.90	
186	1	14.86	14.86	
344	9	14.86	133.74	
345	1,130	14.75	16,667.50	
346	1,846	14.86	27,431.56	
347	431	14.86	6,404.66	
348	77	14.86	1,144.22	
349	10	14.86	148.60	
350	11	14.86	163.46	
352	15	14.86	222.90	
Unable to Classify	77	14.86	1,144.22	
	3,929			58,260.64

Note: These costs are based on figures adopted in the year ended December 31, 1911—See Zolg's Testimony.

Carried Forward	$58,260.64	579,700.78

Plaintiff's Exhibit No. 40. 1885

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES —Continued.

Brought Forward		$ 58,260.64	579,700.78
Add Overhead Expense 36.10% of Combined Labor and Material, ascertained as follows:		21,032.09	
Labor—Direct	$118,202.91		
Material	89,882.47		
	208,085.38		
Divided into aggregate of Indirect Labor and Factory Expenses	75,132.87	79,292.73	
Commission to Agents—35.36% of Sales, being ratio of total Commissions to total Sales		204,982.20	
Commercial and Selling Overhead:			
Total Commercial and Selling Overhead	728,371.04		
From which deduct:			
Commission to Agents	$420,013.02		
Bond Interest	4,187.48		
Preferred Stock Dividend	11,338.50		
Interest	12,962.78	448,501.78	
Net Commercial and Selling Overhead		279,869.26	
of which chargeable against Cylinder Scales—48.8% Cylinder Sales as above, $579,700.78, or 48.8% of total Sales amounting to $1,188,026.45.			136,576.20
Losses on Agents' and Customers' Accounts—3% of Sales		17,391.02	
Depreciation on Buildings—Allowance same as claimed by Company in 1911		303.13	
Allowances for Exchange Scales, etc.:			
Exchange Scale Allowances	69,058.52		
Toledo Scale Allowances	13,720.71		
	82,779.23		
of which 48.8% is chargeable to this account		40,396.26	478,941.54
Profit on Manufacture and Sale of Cylinder Scales, before charging interest			$100,759.24

TOLEDO COMPUTING SCALE COMPANY

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES
For the year ended December 31, 1910.

Based upon evidence submitted by William Slater and William Zolg and other witnesses for the Plaintiff, The Computing Scale Company, and on statements of accounts prepared by Defendant and produced by witness Zolg.

This statement is prepared on basis of charging cost of manufacture on net number of scales sold, that is, after deduction of "Charges to Sales and Charge Backs."

Sales of Cylinder Scales:			
Original Sales	5,619	Scales	$789,358.11
Deduct: Charges to Sales and Charge Backs	559	"	66,732.35
Net	5,060	"	722,625.76
Sales of Second-hand Scales—Proportion 59.46% of $92,107.79			54,767.29
Total Cylinder Sales			777,393.05

Deduct Cost of Cylinder Scales Sold:

Type Number	Number Sold	Cost—Labor and Material Per Scale	Amount	
81	86	$14.86	1,277.96	
82	164	14.86	2,437.04	
83	30	14.86	445.80	
84	7	14.86	104.02	
85	7	14.86	104.02	
86	1	14.86	14.86	
181	42	14.86	624.12	
182	84	14.86	1,248.24	
183	29	14.86	420.94	
184	1	14.86	14.86	
185	9	14.86	133.74	
186	2	14.86	29.72	
300	1	14.86	14.86	
344	*6*	*14.86*	*89.16*	
345	731	14.75	10,782.25	
346	1,537	14.86	22,839.82	
347	611	14.86	9,079.46	
348	108	14.86	1,604.88	
349	1	14.86	14.86	
350	8	14.86	118.88	
351	1	14.86	14.86	
352	136	14.86	2,020.96	
353	253	14.86	3,759.58	
354	7	14.86	104.02	
381	650	15.49	10,068.50	
382	267	15.63	4,173.21	
383	174	17.72	3,083.28	
	4,941	Carried Forward	$74,455.58	777,393.05

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued.

Total Cylinder Sales—Brought Forward					777,393.05
Deduct Cost of Cylinder Scales Sold, Continued:					
Type Number	Number Sold	Cost—Labor and Material Per Scale	Amount		
	4,941 Brought Forward		$74,455.58		
384	68	$17.85	1,213.80		
385	44	15.09	663.96		
386	3	17.37	52.11		
387	5	17.37	86.85		
...	*1*	*14.75*	*14.75*		
	5,060			76,457.55	
Note: These costs are based on figures adopted in the year ended December 31, 1911, See Zolg's Testimony.					
Add Overhead Expense 62.95% of Combined Labor and Material, ascertained as follows:				48,130.03	
Labor—Direct			95,120.13		
Material			112,514.11		
			207,634.24		
Divided into aggregate of Indirect Labor and Factory Expense			130,711.47	124,587.58	
Commission to Agents—31.38% of Sales, being ratio of total Commissions to total Sales				243,945.94	
Commercial and Selling Overhead:					
Total Commercial and Selling Overhead			802,331.96		
From which deduct:					
Commission to Agents		$410,267.62			
Bond Interest		1,749.96			
Interest		22,379.46	434,397.04		
Net Commercial and Selling Overhead			367,934.92		
of which chargeable against Cylinder Scales—59.46%				218,774.10	
Cylinder Sales as above, $777,393.05 or 59.46% of total Sales, amounting to $1,307,438.08.					
Losses on Agents' and Customers' Accounts—3% of Sales				23,321.79	
Carried Forward				$610,629.41	777,393.05

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES,
Continued.

Brought Forward		$610,629.41	777,393.05
Depreciation on Buildings—Allowance same as claimed by Company in 1911		303.13	
Allowances for Exchange Scales, etc.:			
Exchange Scale Allowances	$90,502.22		
Toledo Scale Allowances	10,857.65		
	101,359.87		
of which 59.46% is chargeable to this account		60,268.58	671,201.12
Profit on Manufacture and sale of Cylinder Scales, before charging interest			$106,191.93

Plaintiff's Exhibit No. 40. 1889

TOLEDO COMPUTING SCALE COMPANY

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES
For the year ended December 31, 1911.

Based upon evidence submitted by William Slater and William Zolg and other witnesses for the Plaintiff, The Computing Scale Company, and on statements of accounts prepared by Defendant and produced by witness Zolg.
This statement is prepared on basis of charging cost of manufacture on net number of scales sold, that is, after deduction of "Charges to Sales and Charge Backs".

Sales of Cylinder Scales:			
Original Sales	5,329	Scales	$803,657.26
Deduct: Charges to Sales and Charge Backs	654	"	77,985.87
Net	4,675	"	725,671.39

Deduct Cost of Cylinder Scales Sold:

Type Number	Number Sold	Cost—Labor and Material Per Scale	Amount		
81	16	$14.86	237.76		
82	32	14.86	475.52		
83	4	* 14.86	59.44		
84	2	* 14.86	29.72		
85	6	* 14.86	89.16		
87	1	* 14.86	14.86		
181	20	14.86	297.20		
182	63	14.86	936.18		
183	23	14.86	341.78		
185	4	* 14.86	59.44		
186	2	14.86	29.72		
300	3	* 14.86	44.58		
344	1	* 14.86	14.86		
345	344	14.75	5,074.00		
384	384	14.86	5,706.24		
347	159	14.86	2,362.74		
348	25	* 14.86	371.50		
349	9	14.86	133.74		
350	3	* 14.86	44.58		
351	1	* 14.86	14.86		
353	26	* 14.86	386.36		
354	48	* 14.86	713.28		
381	1,147	15.49	17,767.03		
382	310	15.63	4,845.30		
383	1,158	17.72	20,519.76		
384	267	17.85	4,765.95		
385	88	15.09	1,327.92		
386	5	* 17.37	86.85		
387	32	17.37	555.84		
581	403	13.68	5,513.04		
583	52	16.09	836.68		
585	34	13.21	449.14		
587	3	15.64	46.92		
	4,675			74,151.95	

*These costs are based on the nearest figures as shown in Zolg's Testimony.

Carried Forward	$ 74,151.95	725,671.39

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued.

Brought Forward			$ 74,151.95	725,671.39
Add Overhead Expense 80.17% of Combined Labor and Material, on basis of Plaintiff's Exhibit Number "8", ascertained as follows:			59,447.52	
Labor—Direct		$ 80,960.74		
Material		83,618.32		
		164,579.06		
Divided into aggregate of Indirect Labor and Factory Expense		131,948.35		
			133,599.57	
Commission to Agents—On basis of Zolg's statement and testimony 4,675 Scales at $37.49 Average			175,265.75	
Commercial and Selling Overhead—Plaintiff's Exhibit No. "8":				
Total Commercial and Selling Overhead		792,487.44		
From which deduct:				
Commission to Agents	$ 357,427.55			
Bond Interest	1,750.04			
Interest	26,682.86	385,860.45		
Net Commercial and Selling Overhead		406,626.99		
of which chargeable against Cylinder Scales—60.40%			245,602.70	
New Scales Sold—Plaintiff's Exhibit Number "8"		1,288,012.58		
Foreign Scales Sold—Plaintiff's Exhibit Number "8"		29,514.39		
		$1,317,526.97		
Less: Toledo Scales Charged Back		116,085.31		
Cylinder Sales $725,671.39, or 60.40% of total Sales		1,201,441.66		
Losses on Agents' and Customers' Accounts—3% of Sales			21,770.14	
Depreciation on Buildings—Defendant's Exhibit Page "25"			303.13	
Allowances for Exchange and Second-hand Scales, etc.:				
Exchange Scale Allowances		99,047.24		
Toledo Scale Allowances		29,051.47		
Special Allowances		22,096.23		
		150,194.94		
Less Sales:				
Second-hand Scales	18,46.79			
Refinished Scales Toledo	700.00			
Refinished Exchanges	75,653.56	94,820.35		
Loss on Exchange Scales, etc		55,374.59		
To which Add:				
Losses on Agents' and Customers' Accounts 3% of above $94,820.35		2,844.61		
		$ 58,219.20	570,541.29	725,671.39

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued.

Brought Forward		$ 58,219.20	576,541.29	725,671.39
Commission to Agents applicable to Second-hand Scales, etc.:				
Total Commission Plaintiff's Exhibit Number "8" Charged	$ 357,427.55			
Less: Charged on previous Sheet	175,265.75			
	182,161.80			
Sales Total New Scales—As above	1,201,441.66			
Less: Cylinder Scales sold as above	725,671.39			
Fan Sales	475,770.27			
Add:				
Second-hand Sales	18,466.79			
Refinished Exchanges	75,653.56			
Refinished Toledos	700.00			
Total Sales excluding Cylinder Scales	570,590.62			
Second-hand Sales, etc. equal to 16.62% of $570,590.62, therefore add 16.62% of	182,161.80	30,275.29		
		88,494.49		
of which 60.40% is chargeable to this Account			53,450.67	629,991.96
Net Profit on Manufacture and Sale of Cylinder Scales, before charging interest				$ 95,679.43

Plaintiff's Exhibit No. 40.

3025
1891

TOLEDO COMPUTING SCALE COMPANY

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES
For the eight months to August 31, 1912.

Based upon evidence submitted by William Slater and William Zolg and other witnesses for the Plaintiff, The Computing Scale Company, and on statements of accounts prepared by Defendant and produced by witness Zolg.

This statement is prepared on basis of charging cost of manufacture on net number of scales sold, that is, after deduction of "Charges to Sales and Charge Backs".

Sales of Cylinder Scales: Original Sales	3,263	Scales	$ 516,216.61
Deduct: Charges to Sales and Charge Backs	369	"	47,184.90
Net	2,894	"	469,031.71

Deduct Cost of Cylinder Scales Sold:

Type Number	Number Sold	Cost—Labor and Material Per Scale	Amount	
81	37	$14.86	549.82	
82	22	14.86	326.92	
83	1	14.86	14.86	
87	2	* 14.86	29.72	
181	3	14.86	44.58	
185	1	* 14.86	14.86	
300	4	* 14.86	59.44	
344	8	* 14.86	118.88	
345	257	14.86	3,819.02	
346	98	14.86	1,456.28	
347	30	14.86	445.80	
348	3	* 14.86	44.58	
349	1	* 14.86	14.86	
353	2	* 14.86	29.72	
354	32	* 14.86	475.52	
381	613	15.49	9,495.37	
382	67	15.63	1,047.21	
383	898	17.72	15,912.56	
384	132	17.85	2,356.20	
385	31	15.09	467.79	
387	38	17.37	660.06	
388	1	* 17.37	17.37	
581	426	13.68	5,827.68	
582	2	* 16.09	32.18	
583	157	16.09	2,526.13	
585	29	13.21	383.09	
587	3	15.64	46.92	
	2,894			46,157.97

*These costs are based on the nearest figures as shown in Zolg's Testimony.

Carried Forward	$ 46,157.98	469,031.71

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued.

Brought Forward			$ 46,157.98	469,031.71
Overhead Expense 72.7% of Combined Labor and Material, basis of Plaintiff's Exhibit Number "9", ascertained as follows:			33,556.85	
Labor — Direct		$ 63,250.64		
Material		70,038.24		
		133,288.88		
vided into aggregate of Indirect Labor and Factory Expense		96,861.36		
			79,714.83	
mmissions to Agents — On basis of Zolg's Statement and Testimony — 2,894 Scales at $39.69			114,862.86	
mmercial and Selling Overhead — Plaintiff's Exhibit Number "9":				
Total Commercial and Selling Overhead		544,734.73		
From which deduct:				
Commission to Agents	$ 251,213.18			
Bond Interest	1,166.66			
Interest	17,781.14	270,160.98		
Net Commercial and Selling Overhead		274,573.75		
			161,339.54	
which chargeable against Cylinder Scales — 58.76%				
New Scales Sold — Plaintiff's Exhibit Number "9"		842,641.90		
Foreign Scales Sold — Plaintiff's Exhibit Number "9"		26,718.80		
Total Sales		869,360.70		
Less: Toledo Scales Charged Back		71,084.98		
Cylinder Sales $469,031.71, or 58.76% of total Sales		798,275.72		
			1,505.43	
ses on Customers' Accounts — Zolg's Testimony			16,047.23	
ses on Agents' Accounts — Zolg's Testimony			348.34	
preciation on Buildings — Zolg's Testimony				
lowance for Exchange and Second-hand Scales, etc.:				
Exchange Scale Allowances		55,465.58		
Toledo Scale Allowances		22,650.26		
Special Allowances — Marring		4,918.71		
Special Allowances — Miscellaneous		8,544.01		
		91,578.56		
Less Sales:				
Second-hand Scales	8,518.30			
Refinished Toledo Scales	36,064.50			
Refinished Competition Scales	50,588.00			
	95,170.80			
Deduct Charged Back:				
Second-hand Scales	$ 1,063.00			
Refinished Toledo Scales	2,011.50			
Refinished Competition Scales	6,224.00	9,298.50	85,872.30	
Loss on Exchange Scales, etc.			5,706.26	
which 58.76% applies to Sales of Cylinder Scales.				
o which Add:				
Allowance for Bad Debts — 3% of $85,872.30			2,576.17	
Carried Forward			$ 8,282.43	373,818.23	469,031.71

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued.

Brought Forward			$ 373,818.23	469,03
To which Add, Continued:				
Brought Forward		$ 8,282.43		
Commission to Agents applicable to Second-hand Sales, etc.:				
Total Commissions	$ 251,213.18			
Less: Charged Above	114,862.86			
Applicable to Other Sales	136,350.32			
Sales, Total New Sales, as above	798,275.72			
Second-hand Sales, etc. as above	85,872.30			
Total Sales	884,148.02			
Less: Cylinder Sales	469,031.71			
Total Sales other than Cylinder	415,116.31			
Second-hand Sales, etc. equal to 20.69% of $415,116.31, therefore add 20.69% of $136,350.32		28,212.68		
		36,495.11		
of which 58.76% is chargeable to this Account			21,444.53	395,2
Net Profit on Manufacture and Sale of Cylinder Scales, before charging interest				$ 73,78

Plaintiff's Exhibit No. 40. 1895

BASIS NO. 2.

TOLEDO COMPUTING SCALE COMPANY

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES
For the year ended December 31, 1906.

Based upon evidence submitted by William Slater and William Zolg and other witnesses for the Plaintiff, The Computing Scale Company, and on statements of accounts prepared by Defendant and produced by witness Zolg.

This statement is prepared on basis of charging cost of manufacture on gross number of scales sold, thereby disregarding returns known as "Charges to Sales and Charge Backs".

Sales of Cylinder Scales:			
Original Sales	57 Scales		$ 5,760.00
Deduct: Charges to Sales	2 "		216.00
Net	55 "		5,544.00
Deduct Cost of Cylinder Scales Sold:			
Type Number 300	Number Sold 57	Cost—Labor and Material Per Scale $14.86	$ 847.02
Note: This cost is based on figure adopted in the year ended December 31, 1911 — See Zolg's Testimony.			
Add Overhead Expense 49.42% Combined Labor and Material, ascertained as follows:			418.60
Labor — Direct		$ 45,479.71	
Material		34,706.39	
		80,186.10	
Divided into aggregate of Indirect Labor and Factory Expense		39,631.03	
			1,265.62
Commission to Agents — 31.73% of Sales, being ratio of total Commissions to total Sales			1,759.11
Commercial and Selling Overhead:			
Total Commercial and Selling Overhead		302,541.38	
From which deduct:			
Commission to Agents	$154,734.45		
Bond Interest	3,600.01		
Interest	1,235.41	159,569.87	
Net Commercial and Selling Overhead		142,971.51	
of which chargeable against Cylinder Sales — 1.14% Cylinder Sales as above, $5,544.00 or 1.14% of total sales amounting to $487,609.76.			1,629.88
Losses on Agents' and Customers' Accounts — 3% of Sales			166.32
Allowances for Exchange Scales, net — $18,554.45, of which 1.14% applies on Sales of Cylinder Scales			211.52
			5,032.45
Profit on Manufacture and Sale of Cylinder Scales, before charging interest			$ 511.55

TOLEDO COMPUTING SCALE COMPANY

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES
For the year ended December 31, 1907.

Based upon evidence submitted by William Slater and William Zolg and other witnesses for the Plaintiff, The Computing Scale Company, and on statements of accounts prepared by Defendant and produced by witness Zolg.

This statement is prepared on basis of charging cost of manufacture on gross number of scales sold, thereby disregarding returns known as "Charges to Sales and Charge Backs".

Sales of Cylinder Scales:				
Original Sales	1,221 Scales			$154,758.00
Deduct: Charges to Sales	62 "			6,922.00
Net	1,159 "			147,836.00
Sales of Second-hand Scales — Proportion — 26% of $850.00				221.00
Total Cylinder Sales				148,057.00

Type Number	Number Sold	Cost—Labor and Material Per Scale	Amount	
300	123	$14.86	1,827.78	
344	832	14.86	12,363.52	
345	173	14.75	2,551.75	
346	93	14.86	1,381.98	18,125.03
	1,221			

Note: These costs are based on figures adopted in the year ended December 31, 1911 — See Zolg's Testimony.

Add Overhead Expenses 43.16% of Combined Labor and Material, ascertained as follows:			7,822.76
Labor — Direct		62,225.76	
Material		66,290.87	
		128,516.63	
Divided into aggregate of Indirect Labor and Factory Expense		55,475.80	
			25,947.79
Commission to Agents — 34.2% of Sales, being ratio of total Commissions to total Sales			50,635.49
Commercial and Selling Overhead:			
Total Commercial and Selling Overhead		346,273.98	
From which deduct:			
Commission to Agents	$194,757.15		
Bond Interest	5,087.51		
Interest	629.32	200,473.98	
Net Commercial and Selling Overhead		145,800.00	
of which chargeable against Cylinder Scales — 26%			37,908.00
Cylinder Sales as above $148,057.00, or 26% of total Sales amounting to $569,528.84.			
Carried Forward			$114,491.28 148,057.00

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued.

Brought Forward		$114,491.28	148,057.00
Losses on Agents' and Customers' Accounts — 3% of Sales		4,441.71	
Depreciation on Buildings — Allowance same as claimed by Company in 1911		303.13	
Allowance for Exchange Scales: Exchange Scale Allowances	$24,737.50		
of which 26% is chargeable to this Account		6,431.75	125,667.87
Profit on Manufacture and Sale of Cylinder Scales, before charging interest			$ 22,389.13

TOLEDO COMPUTING SCALE COMPANY

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES
For the year ended December 31, 1908.

Based upon evidence submitted by William Slater and William Zolg and other witnesses for the Plaintiff, The Computing Scale Company, and on statements of accounts prepared by Defendant and produced by witness Zolg.

This statement is prepared on basis of charging cost of manufacture on gross number of scales sold, thereby disregarding returns known as "Charges to Sales and Charge Backs".

Sales of Cylinder Scales:				
Original Sales	3,235	Scales		$ 459,372.50
Deduct: Charges to Sales	183	"		22,295.75
Net	3,052	"		437,076.75
Sales of Second-hand Scales—Proportion 51.66% of $21,647.10				11,182.89
Total Cylinder Sales				448,259.64

Deduct Cost of Cylinder Scales Sold:

Type Number	Number Sold	Cost—Labor and Material Per Scale	Amount		
300	3	$14.86	44.58		
344	49	14.86	728.14		
345	1,592	14.75	23,482.00		
346	1,198	14.86	17,802.28		
347	324	14.86	4,814.64		
348	55	14.86	817.30		
349	7	14.86	104.02		
350	3	14.86	44.58		
Spcl Cyl. 30	4	14.86	59.44		
—	3,235			47,896.98	

Note: These costs are based on figures adopted in the year ended December 31, 1911—See Zolg's Testimony.

Add Overhead Expense 41.19% of Combined Labor and Material, ascertained as follows:		19,728.77	
Labor—Direct	76,663.95		
Material	71,850.68		
	148,514.63		
Divided into aggregate of Indirect Labor and Factory expense	61,168.76		
		67,625.75	
Commission to Agents—38.39% of Sales, being ratio of total Commissions to total Sales		172,086.82	
Carried Forward		$239,712.57	448,259.64

Plaintiff's Exhibit No. 40. 1899

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued

Brought Forward			$ 239,712.57	448,259.64
Commercial and Selling Overhead:				
Total Commercial and Selling Overhead		$ 531,001.93		
From which deduct:				
Commission to Agents	$ 333,080.41			
Bond Interest	4,999.99			
Interest	4,671.86	342,752.26		
Net Commercial and Selling Overhead		188,249.67		
of which chargeable against Cylinder Scales—51.66%			97,249.78	
Cylinder Sales as above, $448,259.64, or 51.66% of total Sales amounting to $867,724.99.				
Losses on Agents' and Customers' Accounts—3% of Sales			13,447.79	
Depreciation on Buildings—Allowance same as claimed by Company in 1911			303.13	
Allowances for Exchange Scales:				
Exchange Scale Allowances		82,905.26		
of which 51.66% is chargeable to this account			42,828.86	393,542.13
Profit on Manufacture and Sale of Cylinder Scales, before charging interest				$ 54,717.51

TOLEDO COMPUTING SCALE COMPANY

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES
For the year ended December 31, 1909.

Based upon evidence submitted by William Slater and William Zolg and other witnesses for the Plaintiff, The Computing Scale Company, and on statements of accounts prepared by Defendant and produced by witness Zolg.

This statement is prepared on basis of charging cost of manufacture on gross number of scales sold, thereby disregarding returns known as "Charges to Sales and Charge Backs".

Sales of Cylinder Scales:			
Original Sales	4,323	Scales	$605,466.41
Deduct: Charges to Sales and Charge Backs	394	"	49,358.33
Net	3,929	"	556,108.08
Sales of Second-hand Scales — Proportion 48.8% of $48,345.70			23,592.70
Total Cylinder Sales			579,700.78

Deduct Cost of Cylinder Scales Sold:

Type Number	Number Sold	Cost — Labor and Material Per Scale	Amount	
81	38	$14.86	564.68	
82	185	14.86	2,749.10	
83	38	14.86	564.68	
84	6	14.86	89.16	
85	6	14.86	89.16	
86	3	14.86	44.58	
181	16	14.86	237.76	
182	58	14.86	861.88	
183	16	14.86	237.76	
186	1	14.86	14.86	
344	5	14.86	74.30	
345	1,293	14.75	19,071.75	
346	1,981	14.86	29,437.66	
347	471	14.86	6,999.06	
348	85	14.86	1,263.10	
349	10	14.86	148.60	
350	13	14.86	193.18	
352	15	14.86	222.90	
Unable to Classify	83	14.86	1,233.38	
	4,323			64,097.55

Note: These costs are based on figures adopted in the year ended December 31, 1911 — See Zolg's Testimony.

Carried Forward	$ 64,097.55	579,700.78

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued.

Brought Forward			$ 64,097.55	579,700.78
Add Overhead Expense 36.10% of Combined Labor and Material, ascertained as follows:			23,139.22	
Labor — Direct		$118,202.91		
Material		89,882.47		
		208,085.38		
Divided into aggregate of Indirect Labor and Factory Expense		75,132.87		
			87,236.77	
Commission to Agent — 35.36% of Sales, being ratio of total Commissions to total Sales			204,982.20	
Commercial and Selling Overhead:				
Total Commercial and Selling Overhead		728,371.04		
From which deduct:				
Commission to Agents	$420,013.02			
Bond Interest	4,187.48			
Preferred Stock Dividend	11,338.50			
Interest	12,962.78	448,501.78		
Net Commercial and Selling Overhead		279,869.26		
of which chargeable against Cylinder Scales — 48.8%			136,576.20	
Cylinder Sales as above, $579,700.78, or 48.8% of total Sales amounting to $1,188,026.45.				
Losses on Agents' and Customers' Accounts — 3% of Sales			17,391.02	
Depreciation on Buildings — Allowance same as claimed by Company in 1911			303.13	
Allowances for Exchange Scales, etc.:				
Exchange Scale Allowances		69,058.52		
Toledo Scale Allowances		13,720.71		
		82,779.23		
of which 48.8% is chargeable to this account			40,396.26	486,885.58
Profit on Manufacture and Sale of Cylinder Scales, before charging interest				$ 92,815.20

TOLEDO COMPUTING SCALE COMPANY

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES
For the year ended December 31, 1910.

Based upon evidence submitted by William Slater and William Zolg and other witnesses for the Plaintiff, The Computing Scale Company, and on statements of accounts prepared by Defendant and produced by witness Zolg.

This statement is prepared on basis of charging cost of manufacture on gross number of scales sold, thereby disregarding returns known as "Charges to Sales and Charge Backs".

Sales of Cylinder Scales:			
Original Sales	5,619	Scales	$789,358.11
Deduct: Charges to Sales and Charge Backs	559	"	66,732.35
Net	5,060	"	722,625.76
Sales of Second-hand Scales — Proportion 59.46% of $92,107.79			54,767.29
Total Cylinder Sales			777,393.05

Deduct Cost of Cylinder Scales Sold:

Type Number	Number Sold	Cost — Labor and Material Per Scale	Amount		
81	95	$14.86	1,411.70		
82	200	14.86	2,972.00		
83	44	14.86	653.84		
84	7	14.86	104.02		
85	8	14.86	118.88		
86	2	14.86	29.72		
181	51	14.86	757.86		
182	104	14.86	1,545.44		
183	33	14.86	490.38		
184	1	14.86	14.86		
185	9	14.86	133.74		
186	3	14.86	44.58		
300	2	14.86	29.72		
344	2	14.86	29.72		
345	884	14.75	13,039.00		
346	1,734	14.86	25,767.24		
347	681	14.86	10,119.66		
348	116	14.86	1,723.76		
349	2	14.86	29.72		
350	9	14.86	133.74		
351	1	14.86	14.86		
352	136	14.86	2,020.96		
353	261	14.86	3,878.46		
354	7	14.86	104.02		
381	659	15.49	10,207.91		
382	270	15.63	4,220.10		
383	175	17.72	3,101.00		
384	69	17.85	1,231.65		
385	45	15.09	679.05		
386	3	17.37	52.11		
387	6	17.37	104.22		
	5,619			84,763.92	

Note: These costs are based on figures adopted in the year ended December 31, 1911 — See Zolg's Testimony.

Carried Forward	$ 84,763.92	777,393.05

Plaintiff's Exhibit No. 40. 1903

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued.

Brought Forward			$ 84,763.92	777,393.05
Add Overhead Expense 62.95% of Combined Labor and Material, ascertained as follows:			53,358.89	
Labor — Direct		$ 95,120.13		
Material		112,514.11		
		207,634.24		
Divided into aggregate of Indirect Labor and Factory Expense		130,711.47		
			138,122.81	
Commission to Agents — 31.38% of Sales, being ratio of total Commissions to total Sales			243,945.94	
Commercial and Selling Overhead:				
Total Commercial and Selling Overhead		802,331.96		
From which deduct:				
Commission to Agents	$410,267.62			
Bond Interest	1,749.96			
Interest	22,379.46	434,397.04		
Net Commercial and Selling Overhead		367,934.92		
of which chargeable against Cylinder Scales — 59.46%			218,774.10	
Cylinder Sales as above, $777,393.05, or 59.46% of total Sales amounting to $1,307,438.08.				
Losses on Agents' and Customers' Accounts — 3% of Sales			23,321.79	
Depreciation on Buildings — Allowance same as claimed by Company in 1911			303.13	
Allowance for Exchange Scales, etc.:				
Exchange Scale Allowances		90,502.22		
Toledo Scale Allowances		10,857.65		
		101,359.87		
of which 59.46% is chargeable to this account			60,268.58	684,736.35
Profit on Manufacture and Sale of Cylinder Scales, before charging interest				$ 92,656.70

TOLEDO COMPUTING SCALE COMPANY

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES
For the year ended December 31, 1911.

Based upon evidence submitted by William Slater and William Zolg and other witnesses for the Plaintiff, The Computing Scale Company, and on statements of accounts prepared by Defendant and produced by witness Zolg.

This statement is prepared on basis of charging cost of manufacture on gross number of scales sold, thereby disregarding returns known as "Charges to Sales and Charge Backs".

Sales of Cylinder Scales:			
Original Sales	5,329 Scales		$803,657.26
Deduct: Charges to Sales and Charge Backs	654 "		77,985.87
Net	4,675 "		725,671.39

Deduct Cost of Cylinder Scales Sold:

Type Number	Number Sold	Cost—Labor and Material Per Scale	Amount		
81	35		$14.86	520.10	
82	65		14.86	965.90	
83	13	*	14.86	193.18	
84	4	*	14.86	59.44	
85	6	*	14.86	89.16	
87	1	*	14.86	14.86	
181	27		14.86	401.22	
182	85		14.86	1,263.10	
183	30		14.86	445.80	
185	4	*	14.86	59.44	
186	2		14.86	29.72	
300	3	*	14.86	44.58	
344	2	*	14.86	29.72	
345	490		14.75	7,227.50	
346	543		14.86	8,068.98	
347	210		14.86	3,120.60	
348	28	*	14.86	416.08	
349	10		14.86	148.60	
350	4	*	14.86	59.44	
351	1	*	14.86	14.86	
353	35	*	14.86	520.10	
354	48	*	14.86	713.28	
381	1,231		15.49	19,068.19	
382	325		15.63	5,079.75	
383	1,192		17.72	21,122.24	
384	289		17.85	5,158.65	
385	95		15.09	1,433.55	
386	6	*	17.37	104.22	
387	38		17.37	660.06	
581	417		13.68	5,704.56	
583	52		16.09	836.68	
585	35		13.21	462.35	
587	3		15.64	46.92	
	5,329				84,082.83

*Note: These costs are based on the nearest figures as shown in Zolg's Testimony.

Carried Forward	$84,082.83	725,671.39

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued.

Brought Forward		84,082.83	725,671.39
Add Overhead Expense 80.17% of Combined Labor and Material on basis of Plaintiff's Exhibit Number "8" ascertained as follows:		67,409.20	
Labor—Direct	$ 80,960.74		
Material	83,618.32		
	164,579.06		
Divided into aggregate of Indirect Labor and Factory Expense	131,948.35		
		151,492.03	
Commissions to Agents—On basis of Zolg's Statement and Testimony—4,675 Scales at $37.49 average		175,265.75	
Commercial and Selling Overhead—Plaintiff's Exhibit Number "8":			
Total Commercial and Selling Overhead	792,487.44		
From which deduct:			
Commission to Agents $357,427.55			
Bond Interest 1,750.04			
Interest 26,682.86	385,860.45		
Net Commercial and Selling Overhead	406,626.99		
of which chargeable against Cylinder Scales—60.40%		245,602.70	
New Scales Sold—Plaintiff's Exhibit Number "8"	1,288,012.58		
Foreign Scales sold "	29,514.39		
	1,317,526.97		
Less: Toledo Scales Charged Back	116,085.31		
Cylinder Sales $725,671.39, or 60.40% of total Sales	1,201,441.66		
Losses on Agents' and Customers' Accounts —3% of Sales		21,770.14	
Depreciation on Buildings—Defendant's Exhibit, Page 25		303.13	
Allowances for Exchange and Second-hand Scales, etc.:			
Exchange Scale Allowances	99,047.24		
Toledo Scale Allowances	29,051.47		
Special Allowances	22,096.23		
Carried Forward	$150,194.94	594,433.75	725,671.39

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued.

Brought Forward			$594,433.75	725,671.39
Allowances for Exchange and Second-hand Scales, etc., Continued:				
Brought Forward		$150,194.94		
Less Sales:				
Second-hand Scales	$ 18,466.79			
Refinished Scales — Toledo	700.00			
Refinished Exchanges	75,653.56	94,820.35		
Loss on Exchange Scales, etc.		55,374.59		
To which Add:				
Losses on Agents' and Customers' Accounts — 3% of above $94,820.35		2,844.61		
Commission to Agents applicable to Second-hand Scales, etc.:				
Total Commission — Plaintiff's Exhibit Number "8" Charged	357,427.55			
Less: Charged on Previous Sheet	175,265.75			
	182,161.80			
Sales — Total New Scales, as above	1,201,441.66			
Less: Cylinder Scales sold as above	725,671.39			
Fan Sales	475,770.27			
Add:				
Second-hand Sales	18,466.79			
Refinished Exchanges	75,653.56			
Refinished Toledos	700.00			
Total Sales, excluding Cylinder Scales	570,590.62			
Second-hand Sales, etc. equal to 16.62% of $570,590.62, therefore add 16.62% of	182,161.80	30,275.29		
		88,494.49		
of which 60.40% is chargeable to this account			53,450.67	647,884.4
Net Profit on Manufacture and Sale of Cylinder scales, before charging interest				$ 77,786.9

Plaintiff's Exhibit No. 40. 1907

TOLEDO COMPUTING SCALE COMPANY

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES
For the eight months to August 31, 1912.

Based upon evidence submitted by William Slater and William Zolg and other witnesses for the Plaintiff, the Computing Scale Company, and on statements of accounts prepared by Defendant and produced by witness Zolg.

This statement is prepared on basis of charging cost of manufacture on gross number of scales sold, thereby disregarding returns known as "Charges to Sales and Charge Backs".

Sales of Cylinder Scales:			
Original Sales	3,263	Scales	$516,216.61
Deduct: Charges to Sales and Charge Backs	369	"	47,184.90
Net	2,894	"	469,031.71

Deduct Cost of Cylinder Scales Sold:

Type Number	Number Sold		Cost — Labor and Material Per Scale	Amount	
81	38		$14.86	564.68	
82	28		14.86	416.08	
83	4		14.86	59.44	
87	*1*	*	14.86	*14.86*	
181	4		14.86	59.44	
182	3	*	14.86	44.58	
183	1	*	14.86	14.86	
185	1	*	14.86	14.86	
300	5	*	14.86	74.30	
344	9	*	14.86	133.74	
345	301		14.86	4,472.86	
346	126		14.86	1,872.36	
347	46		14.86	683.56	
348	3	*	14.86	44.58	
349	1	*	14.86	14.86	
353	4	*	14.86	59.44	
354	32	*	14.86	475.52	
381	680		15.49	10,533.20	
382	80		15.63	1,250.40	
383	988		17.72	17,507.36	
384	147		17.85	2,623.95	
385	34		15.09	513.06	
387	45		17.37	781.65	
388	1	*	17.37	17.37	
581	478		13.68	6,539.04	
582	2	*	16.09	32.18	
583	166		16.09	2,670.94	
585	33		13.21	435.93	
587	4		15.64	62.56	
	3,263				51,957.94

*These costs are based on the nearest figures as shown in Zolg's Testimony.

Carried Forward	$ 51,957.94	469,031.71

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued.

Brought Forward			$ 51,957.94	469,031.71
Add Overhead Expense 72.7% of Combined Labor and Material on basis of Plaintiff's Exhibit Number "9", ascertained as follows:			37,773.42	
Labor — Direct		$ 63,250.64		
Material		70,038.24		
		133,288.88		
Divided into aggregate of Indirect Labor and Factory Expense		96,861.36		
			89,731.36	
Commissions to Agents — On basis of Zolg's Statement and Testimony — 2,894 Scales at $39.69			114,862.86	
Commercial and Selling Overhead — Plaintiff's Exhibit Number "9":				
Total Commercial and Selling Overhead		544,734.73		
From which deduct:				
Commission to Agents	$251,213.18			
Bond Interest	1,166.66			
Interest	17,781.14	270,160.98		
Net Commercial and Selling Overhead		274,573.75		
of which chargeable against Cylinder Scales — 58.76%			161,339.54	
New Scales sold — Plaintiff's Exhibit Number "9"		842,641.90		
Foreign Scales Sold "		26,718.80		
Total Sales		869,360.70		
Less: Toledo Scales Charged Back		71,084.98		
		798,275.72		
Cylinder Sales $469,031.71 or 58.76% of total Sales.				
Losses on Customers' Accounts — Zolg's Testimony			1,505.43	
Losses on Agents' Accounts — Zolg's Testimony			16,047.23	
Depreciation on Buildings — Zolg's Testimony			348.34	
Allowance for Exchange and Second-hand Scales, etc.:				
Exchange Scale Allowances		55,465.58		
Toledo Scale Allowances		22,650.26		
Special Allowances — Marring		4,918.71		
Special Allowances — Miscellaneous		8,544.01		
Carried Forward		$ 91,578.56	383,834.76	469,031.71

Plaintiff's Exhibit No. 40. 1909

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued.

Brought Forward				$383,834.76	469,031.71
Allowance for Exchange and Second-hand Scales, Continued:					
Brought Forward			$ 91,578.56		
Less Sales:					
Second-hand Scales		$ 8,518.30			
Refinished Toledo Scales		36,064.50			
Refinished Competition Scales		50,588.00			
		95,170.80			
Deduct Charged Back:					
Second-hand Scales	$1,063.00				
Refinished Toledo Scales	2,011.50				
Refinished Competition Scales	6,224.00	9,298.50	85,872.30		
Loss on Exhange Scales, etc. of which 58.76% applies to Sales of Cylinder Scales.			5,706.26		
To which Add:					
Allowance for Bad Debts — 3% of $85,872.30			2,576.17		
Commission to Agents applicable to Second-hand Scales, etc.:					
Total Commissions		251,213.18			
Less: Charged above		114,862.86			
Applicable to other Sales		136,350.32			
Sales — Total New Sales, as above		798,275.72			
Second-hand Sales, etc. as above		85,872.30			
Total Sales		884,148.02			
Less: Cylinder Sales		469,031.71			
Total Sales other than Cylinder		415,116.31			
Second-hand Sales, etc. equal to 20.69% of $415,116.31, therefore add 20.69% of $136,350.32			28,212.68		
			36,495.11		
of which 58.76% is chargeable to this account				21,444.53	405,279.29
Net Profit on Manufacture and Sale of Cylinder Scales, before charging interest					$ 63,752.42

BASIS No. 3.

TOLEDO COMPUTING SCALE COMPANY

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES
For the year ended December 31, 1906.

Based upon evidence submitted by William Slater and William Zolg and other witnesses for the Plaintiff, The Computing Scale Company, and on statements of accounts prepared by Defendant and produced by witness Zolg.

This statement is prepared on basis of charging cost of manufacture on net number of scales sold, that is, after deduction of "Charges to Sales and Charge Backs", and after adjustment of Experimental, Development and Organization Charges.

Sales of Cylinder Scales:				
Original Sales	57 Scales			$ 5,760.00
Deduct: Charges to Sales	2 "			216.00
Net	55 "			5,544.00
Deduct Cost of Cylinder Scales Sold:				
Type Number 300 — Number Sold 55 — Cost — Labor and Material Per Scale $14.86			Amount $817.30	
Note: This cost is based on figure adopted in the year ended December 31, 1911 — See Zolg's Testimony.				
Add Overhead Expenses 43.73% of combined labor and material, ascertained as follows:			357.41	
Labor — Direct		$ 45,479.71		
Material		34,706.39		
		80,186.10		
Divided into aggregate of Indirect Labor and Factory Expense after apportioning expenditure chargeable to future operations		35,063.75		
			1,174.71	
Commission to Agents — 31.73% of Sales, being ratio of total Commissions to total Sales			1,759.11	
Commercial and Selling Overhead:				
Total Commercial and Selling Overhead, after apportioning expenditure chargeable to future operations		281,752.93		
From which deduct:				
Commission to Agents	$154,734.45			
Bond Interest	3,600.01			
Interest	1,235.41	159,569.87		
Net Commercial and Selling Overhead		122,183.06		
of which chargeable against Cylinder Scales, 1.14%			1,392.89	
Cylinder Sales as above $5,544.00 or 1.14% of total sales amounting to $487,609.76.				
Carried Forward			$ 4,326.71	5,544.00

Plaintiff's Exhibit No. 40. 1911

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued.

Brought Forward	$ 4,326.71	5,544.00
Losses on Agents' and Customers' Accounts — 3% of Sales	166.32	
Allowances for Exchange Scales, net — $18,554.45, of which 1.14% applies on Sales of Cylinder Scales	211.52	4,704.55
Profit on Manufacture and Sales of Cylinder Scales, before charging Interest		$ 839.45

TOLEDO COMPUTING SCALE COMPANY

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES
For the year ended December 31, 1907.

Based upon evidence submitted by William Slater and William Zolg and other witnesses for the Plaintiff, The Computing Scale Company, and on statements of accounts prepared by Defendant and produced by witness Zolg.

This statement is prepared on basis of charging cost of manufacture on net number of scales sold, that is, after deduction of "Charges to Sales and Charge Backs", and after adjustment of Experimental, Development and Organization Charges.

Sales of Cylinder Scales:				
Original Sales	1,221 Scales			$154,758.00
Deduct: Charges to Sales	62 "			6,922.00
Net	1,159 "			147,836.00
Sales of Second-hand Scales — Proportion 26% of $850.00				221.00
Total Cylinder Sales				148,057.00
Deduct Cost of Cylinder Scales Sold:				
Type Number	Number Sold	Cost — Labor and Material Per Scale	Amount	
300	106	$14.86	1,575.16	
344	789	14.86	11,724.54	
345	171	14.75	2,522.25	
346	93	14.86	1,381.98	
	1,159			17,203.93
Note: These costs are based on figures adopted in the year ended December 31, 1911 — See Zolg's Testimony.				
Add Overhead Expense 41.32% of Combined Labor and Material, ascertained as follows:				7,108.66
Labor — Direct			$ 62,225.76	
Material			66,290.87	
			128,516.63	
Divided into aggregate of Indirect Labor and Factory Expense after apportioning Expenditure chargeable to future operations			53,108.20	
				24,312.59
Commission to Agents — 34.2% of Sales, being ratio of total Commissions to total Sales				50,635.49
Commercial and Selling Overhead:				
Total Commercial and Selling Overhead, after apportioning expenditure chargeable to future operations			325,425.15	
From which deduct:				
Commission to Agents		$194,757.15		
Bond Interest		5,087.51		
Interest		629.32	200,473.98	
Net Commercial and Selling Overhead — Forward			$124,951.17	

Plaintiff's Exhibit No. 40. 1913

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued.

Brought Forward		$ 74,948.08	148,057.00
Net Commercial and Selling Overhead — Brought Forward	$124,951.17		
of which chargeable against Cylinder Scales — 26%		32,487.30	
Cylinder Sales as above, $148,057.00, or 26% of total sales amounting to $569,528.84.			
Losses on Agents' and Customers' Accounts — 3% of Sales		4,441.71	
Depreciation on Buildings — Allowance same as claimed by Company in 1911		303.13	
Allowances for Exchange Scales:			
Exchange Scale Allowances	24,737.50		
of which 26% is chargeable to this account		6,431.75	118,611.97
Profit on Manufacture and Sale of Cylinder Scales, before charging Interest			$ 29,445.03

TOLEDO COMPUTING SCALE COMPANY

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES
For the year ended December 31, 1908.

Based upon evidence submitted by William Slater and William Zolg and other witnesses for the Plaintiff, The Computing Scale Company, and on Statements of accounts prepared by Defendant and produced by witness Zolg.

This statement is prepared on basis of charging cost of manufacture on net number of scales sold, that is, after deduction of "Charges to Sales and Charge Backs", and after adjustment of Experimental, Development and Organization Charges.

Sales of Cylinder Scales:			
Original Sales	3,235	Scales	$459,372.50
Deduct: Charges to Sales	183	"	22,295.75
Net	3,052	"	437,076.75
Sales of Second-hand Scales — Proportion 51.66% of $21,647.10			11,182.89
Total Cylinder Sales			448,259.64

Deduct Cost of Cylinder Scales Sold:

Type Number	Number Sold	Cost — Labor and Material Per Scale	Amount		
300	3	$14.86	44.58		
344	1	14.86	14.86		
345	1505	14.75	22,198.75		
346	1166	14.86	17,326.76		
347	316	14.86	4,695.76		
348	53	14.86	787.58		
349	7	14.86	104.02		
350	3	14.86	44.58		
Spcl. 30 Cyl. —	4	14.86	59.44		
	3052			45,187.17	

Note: These Costs are based on figures adopted in the year ended December 31, 1911 — See Zolg's Testimony.

Add Overhead Expense 39.38% of Combined Labor and Material, ascertained as follows:		17,794.71	
Labor — Direct	$ 76,663.95		
Material	71,850.68		
	148,514.63		
Divided into aggregate of Indirect Labor and Factory Expense after apportioning expenditure chargeable to future operations	58,486.41		
		62,981.88	
Commission to Agents — 38.39% of Sales, being ratio of total Commissions to total Sales		172,086.82	
Carried Forward		$235,068.70	448,259.64

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES,
Continued.

Brought Forward			$235,068.70	448,259.64
Commercial and Selling Overhead:				
Total Commercial and Selling Overhead, after apportioning expenditure chargeable to future operations		$507,718.51		
From which deduct:				
Commission to Agents	$333,080.41			
Bond Interest	4,999.99			
Interest	4,671.86	342,752.26		
Net Commercial and Selling Overhead		164,966.25		
of which chargeable against Cylinder Scales — 51.66%			85,221.56	
Cylinder Sales as above, $448,259.64, or 51.66% of total Sales amounting to $867,724.99.				
Losses on Agents' and Customers' Accounts — 3% of Sales			13,447.79	
Depreciation on Buildings — Allowance same as claimed by Company in 1911			303.13	
Allowances for Exchange Scales: Exchange Scale Allowances		82,905.26		
of which 51.66% is chargeable to this account			42,828.86	376,870.04
Profit on Manufacture and Sale of Cylinder Scales, before charging interest				$ 71,389.60

TOLEDO COMPUTING SCALE COMPANY

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES
For the year ended December 31, 1909.

Based upon evidence submitted by William Slater and William Zolg and other witnesses for the Plaintiff, The Computing Scale Company, and on Statements of accounts prepared by Defendant and produced by witness Zolg.

This statement is prepared on basis of charging cost of manufacture on net number of scales sold, that is, after deduction of "Charges to Scales and Charge Backs", and after adjustment of Experimental, Development and Organization Charges.

Sales of Cylinder Scales:			
Original Sales	4,323 Scales		$605,466.41
Deduct: Charges to Sales and Charge Backs	394 "		49,358.33
Net	3,929 "		556,108,08
Sales of Second-hand Scales—Proportion 48.8% of $48,345.70			23,592.70
Total Cylinder Sales			579,700.78

Deduct Cost of Cylinder Scales Sold:

Type Number	Number Sold	Cost—Labor and Material Per Scale	Amount		
81	34	$14.86	505.24		
82	172	14.86	2,555.92		
83	34	14.86	505.24		
84	5	14.86	74.30		
85	4	14.86	59.44		
86	3	14.86	44.58		
181	16	14.86	237.76		
182	57	14.86	847.02		
183	15	14.86	222.90		
186	1	14.86	14.86		
344	9	14.86	133.74		
345	1,130	14.75	16,667.50		
346	1,846	14.86	27,431.56		
347	431	14.86	6,404.66		
348	77	14.66	1,144.22		
349	10	14.86	148.60		
350	11	14.86	163.46		
352	15	14.86	222.90		
Unable to Classify	17	14.86	1,144.22		
	3,929			58,260.64	
Carried forward				$58,260.64	579,700.78

Note: These costs are based on figures adopted in the year ended December 31, 1911—See Zolg's Testimony.

Plaintiff's Exhibit No. 40. 1917

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued.

Brought Forward			$ 58,260.64	579,700.78
Add Overhead Expense 34.41% of Combined Labor and Material, ascertained as follows:			20,047.49	
Labor—Direct		$ 118,202.91		
Material		89,882.47		
		208,085.38		
Divided into aggregate of Indirect Labor and Factory Expense after apportioning expenditure chargeable to future operations		71,594.69		
				78,308.13
Commission to Agents—35.36% of Sales, being ratio of total Commissions to total Sales			204,982.20	
Commercial and Selling Overhead:				
Total Commercial and Selling Overhead, after apportioning expenditure chargeable to future operations		698,230.32		
From which deduct:				
Commission to Agents	$ 420,013.02			
Bond Interest	4,187.48			
Preferred Stock Dividend	11,338.50			
Interest	12,962.78	448,501.78		
Net Commercial and Selling Overhead		249,728.54		
of which chargeable against Cylinder Scales—48.8%			121,867.53	
Cylinder Sales as above, $579,700.78, or 48.8% of total Sales amounting to $1,188,026.45.				
Losses on Agents' and Customers' Accounts—3% of Sales			17,391.02	
Depreciation on Buildings—Allowance same as claimed by Company in 1911			303.13	
Allowance for Exchange Scales, etc.:				
Exchange Scale Allowances		69,05 .52		
Toledo Scale Allowances		13,720.71		
		82,779.23		
of which 48.8% is chargeable to this account			40,396.26	463,248.27
Profit on Manufacture and Sale of Cylinder Scales, before charging interest				$ 116,452.51

TOLEDO COMPUTING SCALE COMPANY

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES
For the year ended December 31, 1910.

Based upon evidence submitted by William Slater and William Zolg and other witnesses for the Plaintiff, The Computing Scale Company, and on Statements of accounts prepared by Defendant and produced by witness Zolg.

This statement is prepared on basis of charging cost of manufacture on net number of scales sold, that is, after deduction of "Charges to Sales and Charge Banks", and after adjustment of Experimental, Development and Organization Charges.

Sales of Cylinder Scales:			
Original Sales	5,619 Scales		$789,358.11
Deduct: Charges to Sales and Charge Backs	559 "		66,732.35
Net	5,060 "		722,625.76
Sales of Second-hand Scales—Proportion 59.46% of $92,107.79			54,767.29
Total Cylinder Sales			777,393.05

Deduct Cost of Cylinder Scales Sold:

Type Number	Number Sold	Cost—Labor and Material Per Scale	Amount	
81	86	$14.86	1,277.96	
82	164	14.86	2,437.04	
83	30	14.86	445.80	
84	7	14.86	104.02	
85	7	14.86	104.02	
86	1	14.86	14.86	
181	42	14.86	624.12	
182	84	14.86	1,248.24	
183	29	14.86	430.94	
184	1	14.86	14.86	
185	9	14.86	133.74	
186	2	14.86	29.72	
300	1	14.86	14.86	
344	6	14.86	89.16	
345	731	14.75	10,782.25	
346	1,537	14.86	22,839.82	
347	611	14.86	9,079.46	
348	108	14.86	1,604.88	
349	1	14.86	14.86	
350	8	14.86	118.88	
351	1	14.86	14.86	
352	136	14.86	2,020.96	
353	253	14.86	3,759.58	
354	7	14.86	104.02	
381	650	15.49	10,068.50	
382	267	15.63	4,173.21	
383	174	17.72	3,083.28	
384	68	17.85	1,213.80	
385	44	15.09	663.96	
	5,053 Carried Forward		$ 76,333.34	777,393.05

Plaintiff's Exhibit No. 40. 1919

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued.

Total Cylinder Sales—Brought Forward					$ 777,393.05
Deduct Cost of Cylinder Scales Sold, Continued:					
Type Number	Number Sold	Cost—Labor and Material Per Scale	Amount		
	5,053 Brought Forward		$ 76,333.34		
386	3	$17.37	52.11		
387	5	17.37	86.85		
...	*1*	*14.75*	*14.75*		
	5,060			76,457.55	
Note: These costs are based on figures adopted in the year ended December 31, 1911—See Zolg's Testimony.					
Add Overhead Expense 61.50% of Combined Labor and Material, ascertained as follows:				47,021.39	
Labor—Direct			95,120.13		
Material			112,514.11		
			207,634.24		
Divided into aggregate of Indirect Labor and Factory Expense after apportioning expenditure chargeable to future operations			127,693.74		
				123,478.94	
Commission to Agents—31.38% of Sales, being ratio of total Commissions to total Sales				243,945.94	
Commercial and Selling Overhead:					
Total Commercial and Selling Overhead, after apportioning expenditure chargeable to future operations			754,890.82		
From which deduct:					
Commission to Agents		$ 410,267.62			
Bond Interest		1,749.96			
Interest		22,379.46	434,397.04		
Net Commercial and Selling Overhead			320,493.78		
of which chargeable against Cylinder Scales—59.46% Cylinder Sales as above, $777,393.05, or 59.46% of total Sales amounting to $1,307,438.08.				190,565.60	
Losses on Agents' and Customers' Accounts—3% of Sales				23,321.79	
Depreciation on Buildings—Allowance same as claimed by Company in 1911				303.13	
Carried Forward				$ 581,615.40	777,393.05

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES,
Continued.

Brought Forward		$ 581,615.40	777,393.05
Allowances for Exchange Scales, Etc.:			
Exchange Scale Allowances	$ 90,502.22		
Toledo Scale Allowances	10,857.65		
	101,359.87		
of which 59.46% is chargeable to this account		60,268.58	641,883.98
Profit on Manufacture and Sale of Cylinder Scales, before charging interest			$ 135,509.07

Plaintiff's Exhibit No. 40. 1921

TOLEDO COMPUTING SCALE COMPANY

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES
For the year ended December 31, 1911.

Based upon evidence submitted by William Slater and William Zolg and other witnesses for the Plaintiff, The Computing Scale Company, and on Statements of accounts prepared by Defendant and produced by witness Zolg.
This statement is prepared on basis of charging cost of manufacture on net number of scales sold, that is, after deduction of "Charges to Sales and Charge Backs," and after adjustment of Experimental, Development and Organization Charges.

Sales of Cylinder Scales:			
Original Sales	5,329 Scales		$803,657.26
Deduct: Charges to Sales and Charge Backs	654 "		77,985.87
Net	4,675		725,671.39

Type Number	Number Sold	Cost—Labor and Material Per Scale	Amount		
81	16	$14.86	237.76		
82	32	14.86	475.52		
83	4	*14.86	59.44		
84	2	*14.86	29.72		
85	6	*14.86	89.16		
87	1	*14.86	14.86		
181	20	14.86	297.20		
182	63	14.86	936.18		
183	23	14.86	341.78		
185	4	*14.86	59.44		
186	2	14.86	29.72		
300	3	*14.86	44.58		
344	1	*14.86	14.86		
345	344	14.75	5,074.00		
346	384	14.86	5,706.24		
347	159	14.86	2,362.74		
348	25	*14.86	371.50		
349	9	14.86	133.74		
350	3	*14.86	44.58		
351	1	*14.86	14.86		
353	26	*14.86	386.36		
354	48	*14.86	713.28		
381	1,147	15.49	17,767.03		
382	310	15.63	4,845.30		
383	1,158	17,72	20,519.76		
384	267	17.85	4,765.95		
385	88	15.09	1,327.92		
386	5	*17.37	86.85		
387	32	17.37	555.84		
581	403	13.68	5,513.04		
583	52	16.09	836.68		
585	34	13.21	449.14		
587	3	15.64	46.92		
	4,675			74,151.95	

*These costs are based on the nearest figures as shown in Zolg's Testimony.

Carried Forward	$74,151.95	725,671.39

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued.

Brought Forward			$ 74,151.95	725,671.39
Add Overhead Expense 79.48% of Combined Labor and Material on basis of Plaintiff's Exhibit Number "8", ascertained as follows:			58,935.97	
Labor—Direct		$ 80,960.74		
Material		83,618.32		
		164,579.06		
Divided into aggregate of Indirect Labor and Factory Expense after apportioning expenditure chargeable to future operations		130,803.73		
			133,087.92	
Commission to Agents—On basis of Zolg's Statement and Testimony—4,675 Scales at $37.49 Average			175,265.75	
Commercial and Selling Overhead—Plaintiff's Exhibit Number "8":				
Total Commercial and Selling Overhead after apportioning expenditure chargeable to future operations		724,973.78		
From which deduct:				
Commission to Agents	$ 357,427.55			
Bond Interest	1,750.04			
Interest	26,682.86	385,860.45		
Net Commercial and Selling Overhead		339,113.33		
of which chargeable against Cylinder Scales—60.40%			204,824.45	
New Scales sold—Plaintiff's Exhibit Number "8"		1,288,012.58		
Foreign Scales Sold	"	29,514.39		
		1,317,526.97		
Less: Toledo Scales Charges Back		116,085.31		
Cylinder Sales $725,671.39, or 60.40% of total Sales		1,201,441.66		
Losses on Agents' and Customers' Accounts—3% of Sales			21,770.14	
Depreciation on Buildings—Defendant's Exhibit, Page "25"			303.13	
Carried Forward			$ 535,251.39	725,671.39

Plaintiff's Exhibit No. 40. 1923

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued.

Brought Forward			$ 535,251.39	725,671.39
Allowances for Exchange and Second-hand Scales, etc.:				
Exchange Scale Allowances		$ 99,047.24		
Toledo Scale Allowances		29,051.47		
Special Allowances		22,096.23		
		150,194.94		
Less Sales:				
Second-hand Scales	$ 18,466.79			
Refinished Scales—Toledo	700.00			
Refinished Exchanges	75,653.56	94,820.35		
Loss on Exchange Scales, etc.		55,374.59		
To which Add:				
Losses on Agents' and Customers' Accounts.. 3% of above $94,820.35		2,844.61		
Commission to Agents applicable to Second-hand Scales, etc.:				
Total Commission, Plaintiff's Exhibit Number "8", Charged	357,427.55			
Less: Charged on Previous Sheet	175,265.75			
	182,161.80			
Sales—Total New Scales, as above	1,201,441.66			
Less: Cylinder Scales, sold as above	725,671.39			
Fan Sales	475,770.27			
Add:				
Second-hand Sales	18,466.79			
Refinished Exchanges	75,653.56			
Refinished Toledos	700.00			
Total Sales, excluding Cylinder Scales	570,590.62			
Second-hand Sales, etc. equal to 16.62% of $570,590.62, therefore add 16.62% of	182,161.80	30,275.29		
		88,494.49		
of which 60.40% is chargeable to this account			53,450.67	588,702.06
Net Profit on Manufacture and Sale of Cylinder Scales, before charging interest				$ 136,969.33

TOLEDO COMPUTING SCALE COMPANY

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES
For the eight months to August 31, 1912.

Based upon evidence submitted by William Slater and William Zolg and other witnesses for the Plaintiff, The Computing Scale Company, and on statements of accounts prepared by Defendant and produced by witness Zolg.

This statement is prepared on basis of charging cost of manufacture on net number of scales sold, that is, after deduction of "Charges to Sales and Charge Backs", and after adjustment of Experimental, Development and Organization Charges.

Sales of Cylinder Scales:			
Original Sales	3,263	Scales	$516,216.61
Deduct: Charges to Sales and Charge Backs	369	"	47,184.90
Net	2,894	"	469,031.71

Deduct Cost to Cylinder Scales Sold:

Type Number	Number Sold	Cost — Labor and Material Per Scale	Amount	
81	37	$14.86	549.82	
82	22	14.86	326.92	
83	1	14.86	14.86	
87	*2*	* *14.86*	*29.72*	
181	3	14.86	44.58	
185	1	* 14.86	14.86	
300	4	* 14.86	59.44	
344	8	* 14.86	118.88	
345	257	14.86	3,819.02	
346	98	14.86	1,456.28	
347	30	14.86	445.80	
348	3	* 14.86	44.58	
349	1	* 14.86	14.86	
353	2	* 14.86	29.72	
354	32	* 14.86	475.52	
381	613	15.49	9,495.37	
382	67	15.63	1,047.21	
383	898	17.72	15,912.56	
384	132	17.85	2,356.20	
385	31	15.09	467.79	
387	38	17.37	660.06	
388	1	* 17.37	17.37	
581	426	13.68	5,827.68	
582	2	* 16.09	32.18	
583	157	16.09	2,526.13	
585	29	13.21	383.09	
587	3	15.64	46.92	
	2,894			46,157.98

Note: These costs are based on the nearest figures as shown in Zolg's Testimony.

Carried Forward	$ 46,157.98	469,031.71

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued.

Brought Forward			$ 46,157.98	469,031.71
Add Overhead Expense 70.29% of Combined Labor and Material on basis of Plaintiff's Exhibit Number "9" ascertained as follows:			32,444.44	
Labor — Direct		$ 63,250.64		
Material		70,038.24		
		133,288.88		
Divided into aggregate of Indirect Labor and Factory Expense after apportioning expenditure chargeable to future operations		93,687.91		
			78,602.42	
Commissions to Agents — On basis of Zolg's Statement and Testimony — 2,894 Scales at $39.69			114,862.86	
Commercial and Selling Overhead — Plaintiff's Exhibit Number "9":				
Total Commercial and Selling Overhead after apportioning expenditure chargeable to future operations		514,350.55		
From which Deduct:				
Commission to Agents	$251,213.18			
Bond Interest	1,166.66			
Interest	17,781.14	270,160.98		
Net Commercial and Selling Overhead		244,189.57		
of which chargeable against Cylinder Scales — 58.76%			143,485.79	
New Scales Sold — Plaintiff's Exhibit Number "9"		842,641.90		
Foreign Scales Sold — Plaintiff's Exhibit Number "9"		26,718.80		
Total Sales		869,360.70		
Less: Toledo Scales Charged Back		71,084.98		
Cylinder Sales $469,031.71 or 58.76% of total Sales		798,275.72		
Losses on Customers' Accounts — Zolg's Testimony			1,505.43	
Losses on Agents' Accounts — Zolg's Testimony			16,047.23	
Depreciation on Buildings — Zolg's Testimony			348.34	
Allowances for Exchange and Second-hand Scales, etc.:				
Exchange Scale Allowances		55,465.58		
Toledo Scale Allowances		22,650.26		
Special Allowances — Marring		4,918.71		
Special Allowances — Miscellaneous		8,544.01		
		91,578.56		
Less Sales:				
Second-hand Scales	8,518.30			
Refinished Toledo Scales	36,064.50			
Refinished Competition Scales	50,588.00			
	95,170.80			
Deduct Charged Back:				
Second Hand Scales	$1,063.00			
Refinished Toledo Scales	2,011.50			
Refinished Competition Scales	6,224.00	9,298.50	85,872.30	
			5,706.26	
of which 58.76% applies to Sales of Cylinder Scales				
Carried Forward			$ 5,706.26	354,852.07	469,031.71

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES,
Continued.

Brought Forward		$ 5,706.26	354,852.07	469,031.71
To which Add:				
Allowance for Bad Debts — 3% of $85,872.30		2,576.17		
Commission to Agents applicable to Second-hand Sales, etc.:				
Total Commissions	$251,213.18			
Less: Charged Above	114,862.86			
Applicable to Other Sales	136,350.32			
Sales, Total New Sales as above	798,275.72			
Second-hand Sales, etc. as above	85,872.30			
Total Sales	884,148.02			
Less: Cylinder Sales	469,031.71			
Total Sales Other than Cylinder	415,116.31			
Second-hand Sales, etc., equal to 20.69% of $415,116.31 therefore add 20.69% of $136,350.32		28,212.68		
		36,495.11		
of which 58.76% is chargeable to this Account			21,444.53	
				376,296.60
Net Profit on Manufacture and Sale of Cylinder Scales, before charging Interest				$ 92,735.11

Plaintiff's Exhibit No. 40. 1927

BASIS No. 4

TOLEDO COMPUTING SCALE COMPANY

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES
For the year ended December 31, 1906.

Based upon evidence submitted by William Slater and William Zolg and other witnesses for the Plaintiff, The Computing Scale Company, and on statements of accounts prepared by Defendant and produced by witness Zolg.

This statement is prepared on basis of charging cost of manufacture on gross number of scales sold, thereby disregarding returns known as "Charges to Sales and Charge Backs", and after adjustment of Experimental, Development and Organization Charges.

Sales of Cylinder Scales:				
Original Sales	57 Scales			$5,760.00
Deduct: Charges to Sales	2 "			216.00
Net	55 "			5,544.00
Deduct Cost of Cylinder Scales Sold:				
Type Number 300	Number Sold 57	Cost—Labor and Material Per Scale $14.86	Amount 847.02	
Note: This cost is based on figure adopted in the year ended December 31, 1911—See Zolg's testimony.				
Add Overhead Expense 43.73% of Combined Labor and Material, ascertained as follows:			370.40	
Labor—Direct		$45,479.71		
Material		34,706.39		
		80,186.10		
Divided into aggregate of Indirect Labor and Factory Expense after apportioning expenditure chargeable to future operations		35,063.75		
			1,217.42	
Commission to Agents—31.73% of Sales, being ratio of total Commissions to total Sales			1,759.11	
Commercial and Selling Overhead:				
Total Commercial and Selling Overhead, after apportioning expenditure chargeable to future operations		281,752.93		
From which deduct:				
Commission to Agents	$154,734.45			
Bond Interest	3,600.01			
Interest	1,235.41	159,569.87		
Net Commercial and Selling Overhead		$122,183.06		
of which chargeable against Cylinder Scales 1.14%			1,392.89	
Carried Forward			$4,369.42	5,544.00

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued

Brought Forward	$4,369.42	5,544.00
Cylinder Sales as above, $5,544.00, or 1.14 %of total Sales amounting to $487,609.76.		
Losses on Agents' and Customers' Accounts—3% of Sales	166.32	
Allowances for Exchange Scales, net—$18,554.45, of which 1.14% applies on Sales of Cylinder Scales	211.52	4,747.26
Profit on Manufacture and Sale of Cylinder Scales, before charging Interest		$796.74

Plaintiff's Exhibit No. 40. 1929

TOLEDO COMPUTING SCALE COMPANY

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES
For the year ended December 31, 1907.

Based upon evidence submitted by William Slater and William Zolg and Other witnesses for the Plaintiff, The Computing Scale Company, and on statements of accounts prepared by Defendant and produced by witness Zolg.

This statement is prepared on basis of charging cost of manufacture on gross number of scales sold, thereby disregarding returns known as "Charges to Sales and Charge Backs", and after adjustment of Experimental, Development and Organization Charges.

Sales of Cylinder Scales:				
Original Sales	1,221 Scales			$154,758.00
Deduct: Charges to Sales	62 "			6,922.00
Net	1,159 "			147,836.00
Sales of Second-hand Scales—Proportion 26% of $850.00				221.00
Total Cylinder Sales				148,057.00
Deduct Cost of Cylinder Scales Sold:				
Type Number	Number Sold	Cost—Labor and Material Per Scale	Amount	
300	123	$14.86	1,827.78	
344	832	14.86	12,363.52	
345	173	14.75	2,551.75	
346	93	14.86	1,381.98	
	1,221			18,125.03
Note: These costs are based on figures adopted in the year ended December 31, 1911—See Zolg's testimony.				
Add Overhead Expense 41.32% of Combined Labor and Material, ascertained as follows:				7,489.26
Labor—Direct			$62,225.76	
Material			66,290.37	
			128,516.63	
Divided into aggregate of Indirect Labor and Factory Expense after apportioning expenditure chargeable to future operations			53,108.20	
				25,614.29
Commission to Agents—34.2% of Sales, being ratio of total Commissions to total Sales				50,635.49
Carried Forward				$76,249.78 148,057.00

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued

Brought Forward			$76,249.78	148,057.00
Commercial and Selling Overhead:				
Total Commercial and Selling Overhead, after apportioning expenditure chargeable to future operations		$325,425.15		
From which deduct:				
Commission to Agents	$194,757.15			
Bond Interest	5,087.51			
Interest	629.32	200,473.98		
Net Commercial and Selling Overhead		124,951.17		
of which chargeable against Cylinder Scales—26%			32,487.30	
Cylinder Sales as above, $148,057.00, or 26% of total Sales amounting to $569,528.84.				
Losses on Agents' and Customers' Accounts—3% of Sales			4,441.71	
Depreciation on Buildings—Allowance same as claimed by Company in 1911			303.13	
Allowance for Exchange Scales:				
Exchange Scale Allowances		24,737.50		
of which 26% is chargeable to this account			6,431.75	119,913.67
Profit on Manufacture and Sale of Cylinder Scales, before charging interest				$28,143.33

Plaintiff's Exhibit No. 40. 1931

TOLEDO COMPUTING SCALE COMPANY

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES
For the year ended December 31, 1908.

Based upon evidence submitted by William Slater and William Zolg and other witnesses for the Plaintiff, The Computing Scale Company, and on statements of accounts prepared by Defendant and produced by witness Zolg.

This statement is prepared on basis of charging cost of manufacture on gross number of scales sold, thereby disregarding returns known as "Charges to Sales and Charge Backs", and after adjustment of Experimental, Development and Organization Charges.

Sales of Cylinder Scales:			
Original Sales	3,235	Scales	$459,372.50
Deduct: Charges to Sales	183	"	22,295.75
Net	3,052	"	437,076.75
Sales of Second-hand Scales — Proportion 51.66% of $21,647.10			11,182.89
Total Cylinder Sales			448,259.64

Deduct Cost of Cylinder Scales Sold:

Type Number	Number Sold	Cost — Labor and Material Per Scale	Amount		
300	3	$14.86	44.58		
344	49	14.86	728.14		
345	1,592	14.75	23,482.00		
346	1,198	14.86	17,802.28		
347	324	14.86	4,814.64		
348	55	14.86	817.30		
349	7	14.86	104.02		
350	3	14.86	44.58		
Spcl. 30 Cyl.	4	14.86	59.44		
	3,235			47,896.98	

Note: These costs are based on figures adopted in the year ended December 31, 1911 — See Zolg's Testimony.

All Overhead Expense 39.38% of Combined Labor and Material, ascertained as follows:		18,861.83	
Labor — Direct	$ 76,663.95		
Material	71,850.68		
	$148,514.63		
Divided into aggregate of Indirect Labor and Factory Expense, after apportioning expenditure chargeable to future operations	$ 58,486.41		
Carried Forward		$ 66,758.81	448,259.64

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued

Brought Forward			$ 66,758.81	448,259.64
Commission to Agents — 38.39% of Sales, being ratio of total Commissions to total Sales			172,086.82	
Commercial and Selling Overhead:				
Total Commercial and Selling Overhead, after apportioning expenditure chargeable to future operations		$507,718.51		
From which deduct:				
Commission to Agents	$333,080.41			
Bond Interest	4,999.99			
Interest	4,671.86	342,752.26		
Net Commercial and Selling Overhead		164,966.25		
of which chargeable against Cylinder Scales — 51.66%			85,221.56	
Cylinder Sales as above, $448,259.64, or 51.66% of total Sales amounting to $867,724.99.				
Losses on Agents' and Customers' Accounts — 3% of Sales			13,447.79	
Depreciation on Buildings — Allowance same as claimed by Company in 1911			303.13	
Allowances for Exchange Scales:				
Exchange Scale Allowances		82,905.26		
of which 51.66% is chargeable to this account			42,828.86	380,646.97
Profit on Manufacture and Sale of Cylinder Scales, before charging interest				$ 67,612.67

Plaintiff's Exhibit No. 40. 1933

TOLEDO COMPUTING SCALE COMPANY

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES
For the year ended December 31, 1909.

Based upon evidence submitted by William Slater and William Zolg and other witnesses for the Plaintiff, The Computing Scale Company, and on statements of accounts prepared by Defendant and produced by witness Zolg.

This statement is prepared on basis of charging cost of manufacture on gross number of scales sold, thereby disregarding returns known as "Charges to Sales and Charge Backs", and after adjustment of Experimental, Development and Organization Charges.

Sales of Cylinder Scales:			
Original Sales	4,323 Scales		$605,466.41
Deduct: Charges to Sales and Charge Backs	394 "		49,358.33
Net	3,929 "		556,108.08
Sales of Second-hand Scales—Proportion 48.8% of $48,345.70			23,592.70
Total Cylinder Sales			579,700.78

Deduct Cost of Cylinder Scales Sold:

Type Number	Number Sold	Cost—Labor and Material Per Scale	Amount		
81	38	$14.86	564.68		
82	185	14.86	2,749.10		
83	38	14.86	564.68		
84	6	14.86	89.16		
85	6	14.86	89.16		
86	3	14.86	44.58		
181	16	14.86	237.76		
182	58	14.86	861.88		
183	16	14.86	237.76		
186	1	14.86	14.86		
344	5	14.86	74.30		
345	1,293	14.75	19,071.75		
346	1,981	14.86	29,437.66		
347	471	14.86	6,999.06		
348	85	14.86	1,263.10		
349	10	14.86	148.60		
350	13	14.86	193.18		
352	15	14.86	222.90		
Unable to Classify	83	14.86	1,233.38		
	4,323			64,097.55	

Note: These costs are based on figures adopted in the year ended December 31, 1911—See Zolg's testimony.

Carried Forward	$64,097.55	579,700.78

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued

Brought Forward			$64,097.55	579,700.78
Add Overhead Expense 34.41% of Combined Labor and Material, ascertained as follows:			22,055.97	
Labor—Direct		$118,202.91		
Material		89,882.47		
		208,085.38		
Divided into aggregate of Indirect Labor and Factory Expense, after apportioning expenditure chargeable to future operations		71,594.69		
			86,153.52	
Commission to Agents—35.36% of Sales, being ratio of total Commissions to total Sales			204,982.20	
Commercial and Selling Overhead:				
Total Commercial and Selling Overhead, after apportioning expenditure chargeable to future operations		698,230.32		
From which deduct:				
Commission to Agents	$420,013.02			
Bond Interest	4,187.48			
Preferred Stock Dividend	11,338.50			
Interest	12,962.78	448,501.78		
Net Commercial and Selling Overhead		249,728.54		
of which chargeable against Cylinder Scales—48.8%			121,867.53	
Cylinder Sales as above, $579,700.78, or 48.8% of total Sales amounting to $1,188,026.45.				
Losses on Agents' and Customers' Accounts—3% of Sales			17,391.02	
Depreciation on Buildings—Allowance same as claimed by Company in 1911			303.13	
Allowances for Exchange Scales, etc.:				
Exchange Scale Allowances		69,058.52		
Toledo Scale Allowances		13,720.71		
		82,779.23		
of which 48.8% is chargeable to this account			40,396.26	471,093.66
Profit on Manufacture and Sale of Cylinder Scales, before charging interest				$108,607.12

Plaintiff's Exhibit No. 40. 1935

TOLEDO COMPUTING SCALE COMPANY

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES
For the year ended December 31, 1910.

Based upon evidence submitted by William Slater and William Zolg and other witnesses for the Plaintiff, The Computing Scale Company, and on statements of accounts prepared by Defendant and produced by witness Zolg.

This statement is prepared on basis of charging cost of manufacture on gross number of scales sold, thereby disregarding returns known as "Charges to Sales and Charge Backs", and after adjustment of Experimental, Development and Organization Charges.

Sales of Cylinder Scales:			
Original Sales	5,619	Scales	$789,358.11
Deduct: Charges to Sales and Charge Backs	559	"	66,732.35
Net	5,060	"	722,625.76
Sales of Second-hand Scales — Proportion 59.46% of $92,107.79			54,767.29
Total Cylinder Sales			777,393.05

Deduct Cost of Cylinder Scales Sold:

Type Number	Number Sold	Cost — Labor and Material Per Scale	Amount	
81	95	$14.86	1,411.70	
82	200	14.86	2,972.00	
83	44	14.86	653.84	
84	7	14.86	104.02	
85	8	14.86	118.88	
86	2	14.86	29.72	
181	51	14.86	757.86	
182	104	14.86	1,545.44	
183	33	14.86	490.38	
184	1	14.86	14.86	
185	9	14.86	133.74	
186	3	14.86	44.58	
300	2	14.86	29.72	
344	2	14.86	29.72	
345	884	14.75	13,039.00	
346	1,734	14.86	25,767.24	
347	681	14.86	10,119.66	
348	116	14.86	1,723.76	
349	2	14.86	29.72	
350	9	14.86	133.74	
351	1	14.86	14.86	
352	136	14.86	2,020.96	
353	261	14.86	3,878.46	
354	7	14.86	104.02	
381	659	15 49	10,207.91	
	5,051	Carried Forward	$ 75,375.79	777,393.05

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued

Brought Forward					$777,393.05
Deduct Cost of Cylinder Scales Sold, Continued:					
Type Number	Number Sold	Cost — Labor and Material Per Scale	Amount		
	5,051	Brought Forward	$ 75,375.79		
382	270	$15.63	4,220.10		
383	175	17.72	3,101.00		
384	69	17.85	1,231.65		
385	45	15.09	679.05		
386	3	17.37	52.11		
387	6	17.37	104.22		
	5,619			84,763.92	
Note: These costs are based on figures adopted in the year ended December 31, 1911 — See Zolg's testimony.					
Add Overhead Expense 61.50% of Combined Labor and Material, ascertained as follows:				52,129.81	
Labor — Direct			$ 95,120.13		
Material			112,514.11		
			207,634.24		
Divided into aggregate of Indirect Labor and Factory Expense, after apportioning expenditure chargeable to future operations			127,693.74		
				136,893.73	
Commission to Agents — 31.38% of Sales, being ratio of total Commissions to total Sales				243,945.94	
Commercial and Selling Overhead:					
Total Commercial and Selling Overhead, after apportioning expenditure chargeable to future operations			754,890.82		
From which deduct:					
Commission to Agents		$410,267.62			
Bond Interest		1,749.96			
Interest		22,379.46	434,397.04		
Net Commercial and Selling Overhead			320,493.78		
of which chargeable against Cylinder Scales — 59.46%				190,565.60	
Cylinder Sales as above, $777,393.05, or 59.46% of total Sales amounting to $1,307,438.08.					
Carried Forward				$571,405.27	777,393.05

Plaintiff's Exhibit No. 40. 1937

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES,
Continued

Brought Forward		$571,405.27	777,393.05
Losses on Agents' and Customers' Accounts — 3% of Sales		23,321.79	
Depreciation on Buildings — Allowance same as claimed by Company in 1911		303.13	
Allowances for Exchange Scales, etc.:			
Exchange Scale Allowances	$ 90,502.22		
Toledo Scale Allowances	10,857.65		
	101,359.87		
of which 59.46% is chargeable to this account		60,268.58	655,298.77
Profit on Manufacture and Sale of Cylinder Scales, before charging interest			$122,094.28

TOLEDO COMPUTING SCALE COMPANY

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES
For the year ended December 31, 1911.

Based upon evidence submitted by William Slater and William Zolg and other witnesses for the Plaintiff, The Computing Scale Company, and on statements of accounts prepared by Defendant and produced by witness Zolg.

This statement is prepared on basis of charging cost of manufacture on gross number of scales sold, thereby disregarding returns known as "Charges to Sales and Charge Backs", and after adjustment of Experimental, Development and Organization Charges.

Sales of Cylinder Scales:			
Original Sales	5,329 Scales		$803,657.26
Deduct: Charges to Sales and Charge Backs	654 "		77,985.87
Net	4,675 "		725,671.39

Deduct Cost of Cylinder Scales Sold:

Type Number	Number Sold	Cost—Labor and Material Per Scale	Amount	
81	35	$14.86	520.10	
82	65	14.86	965.90	
83	13	* 14.86	193.18	
84	4	* 14.86	59.44	
85	6	* 14.86	89.16	
87	1	* 14.86	14.86	
181	27	14.86	401.22	
182	85	14.86	1,263.10	
183	30	14.86	445.80	
185	4	* 14.86	59.44	
186	2	14.86	29.72	
300	3	* 14.86	44.58	
344	2	* 14.86	29.72	
345	490	14.75	7,227.50	
346	543	14.86	8,068.98	
347	210	14.86	3,120.60	
348	28	* 14.86	416.08	
349	10	14.86	148.60	
350	4	* 14.86	59.44	
351	1	* 14.86	14.86	
353	35	* 14.86	520.10	
354	48	* 14.86	713.28	
381	1,231	15.49	19,068.19	
382	325	15.63	5,079.75	
383	1,192	17.72	21,122.24	
384	289	17.85	5,158.65	
385	95	15.09	1,433.55	
386	6	* 17.37	104.22	
	4,784	Carried Forward	$76,372.26	725,671.39

Plaintiff's Exhibit No. 40. 1939

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued

Brought Forward					$725,671.39
Deduct Cost of Cylinder Scales Sold, Continued:					
Type Number	Number Sold	Cost—Labor and Material Per Scale	Amount		
	4,784	Brought Forward	$76,372.26		
387	38	$17.37	660.06		
581	417	13.68	5,704.56		
583	52	16.09	836.68		
585	35	13.21	462.35		
587	3	15.64	46.92		
	5,329			84,082.83	
Note: *These costs are based on the nearest figures shown in Zolg's testimony.					
Add Overhead Expense 79.48% of Combined Labor and Material on basis of Plaintiff's Exhibit No. 8, ascertained as follows:				66,829.03	
Labor—Direct			$80,960.74		
Material			83,618.32		
			164,579.06		
Divided into aggregate of Indirect Labor and Factory Expense, after apportioning expenditure chargeable to future operations			130,803.73		
				150,911.86	
Commission to Agents—On basis of Zolg's Statement and Testimony, 4,675 Scales at $37.49 average				175,265.75	
Commercial and Selling Overhead, Plaintiff's Exhibit No. 8:					
Total Commercial and Selling Overhead, after apportioning expenditure chargeable to future operations			724,973.78		
From which deduct:					
Commission to Agents	$357,427.55				
Bond Interest	1,750.04				
Interest	26,682.86		385,860.45		
Net Commercial and Selling Overhead			339,113.33		
of which chargeable against Cylinder Sales—60.40%				204,824.45	
Carried Forward				$531,002.06	725,671.39

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued.

Brought Forward			$ 531,002.06	725,671.39
New Scales Sold—Plaintiff's Exhibit Number "8"		$1,288,012.58		
Foreign Scales Sold—Plaintiff's Exhibit Number "8"		29,514.39		
		1,317,526.97		
Less: Toledo Scales Charged Back		116,085.31		
Cylinder Sales $725,671.39, or 60.40% of total Sales		1,201,441.66		
Losses on Agents' and Customers' Accounts—3% of Sales			21,770.14	
Depreciation on Buildings—Defendant's Exhibit Page "25"			303.13	
Allowances for Exchange and Second-hand Scales, etc.:				
Exchange Scale Allowances		99,047.24		
Toledo Scale Allowances		29,051.47		
Special Allowances		22,096.23		
		150,194.94		
Less Sales:				
Second-hand Scales	$ 18,466.79			
Refinished Scales Toledo	700.00			
Refinished Exchanges	75,653.56	94,820.35		
Loss on Exchange Scales, etc.		55,374.59		
To which Add:				
Losses on Agents' and Customers' Accounts 3% of above $94,820.35		2,844.61		
Commission to Agents applicable to Second-hand Scales, etc.:				
Total Commission Plaintiff's Exhibit Number "8" Charged	357,427.55			
Less: Charged on previous Sheet	175,265.75			
	182,161.80			
Sales Total New Scales—As above	1,201,441.66			
Less: Cylinder Scales sold as above	725,671.39			
Fan Sales	475,770.27			
Add:				
Second-hand Sales	18,466.79			
Refinished Exchanges	75,653.56			
Refinished Toledos	700.00			
Total Sales excluding Cylinder Scales	570,590.62			
Second-hand Sales, etc. equal to 16.62% of $570,590.62 therefore add 16.62% of	182,161.80	30,275.29		
		88,494.49		
of which 60.40% is chargeable to this account			53,450.67	606,526.00
Net Profit on Manufacture and Sale of Cylinder Scales, before charging Interest				$ 119,145

Plaintiff's Exhibit No. 40. 1941

TOLEDO COMPUTING SCALE COMPANY

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES
For the eight months to August 31, 1912.

Based upon evidence submitted by William Slater and William Zolg and other witnesses for the Plaintiff, The Computing Scale Company, and on statements of accounts prepared by Defendant and produced by witness Zolg.

This statement is prepared on basis of charging cost of manufacture on gross number of scales sold, thereby disregarding returns known as "Charges to Sales and Charge Backs", and after adjustment of Experimental, Development and Organization Charges.

Sales of Cylinder Scales:			
Original Sales	3,263	Scales	$516,216.61
Deduct: Charges to Sales and Charge Backs	369	"	47,184.90
Net	2,894	"	469,031.71

Deduct Cost of Cylinder Scales Sold:

Type Number	Number Sold		Cost — Labor and Material Per Scale	Amount		
81	38		$14.86	564.68		
82	28		14.86	416.08		
83	4		14.86	59.44		
87	*1*	*	*14.86*	*14.86*		
181	4		14.86	59.44		
182	3	*	14.86	44.58		
173	1	*	14.86	14.86		
185	1	*	14.86	14.86		
300	5	*	14.86	74.30		
344	9	*	14.86	133.74		
345	301		14.86	4,472.86		
346	126		14.86	1,872.36		
347	46		14.86	683.56		
348	3	*	14.86	44.58		
349	1	*	14.86	14.86		
353	4	*	14.86	59.44		
354	32	*	14.86	475.52		
381	680		15.49	10,533.20		
382	80		15.63	1,250.40		
383	988		17.72	17,507.36		
384	147		17.85	2,623.95		
385	34		15.09	513.06		
387	45		17.37	781.65		
388	1	*	17.37	17.37		
581	478		13.68	6,539.04		
582	2	*	16.09	32.18		
583	166		16.09	2,670.94		
585	33		13.21	435.93		
587	4		15.64	62.56		
	3,263				51,957.94	

Note: *These costs are based on the nearest figures as shown in Zolg's Testimony.

Carried Forward	$ 51,957.94	469,031.71

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued

Brought Forward			$ 51,957.94	469,031.71
Add Overhead Expenses 70.29% of Combined Labor and Material on basis of Plaintiff's Exhibit Number "9", ascertained as follows:			36,521.24	
Labor — Direct		$ 63,250.64		
Material		70,038.24		
		133,288.88		
Divided into aggregate of Indirect Labor and Factory Expense, after apportioning expenditure chargeable to future operations		93,687.91		
			88,479.18	
Commission to Agents — On basis of Zolg's Statement and Testimony — 2,894 Scales at $39.69			114,862.86	
Commercial and Selling Overhead — Plaintiff's Exhibit Number "9":				
Total Commercial and Selling Overhead, after apportioning expenditure chargeable to future operations		514,350.55		
From which deduct:				
Commission to Agents	$251,213.18			
Bond Interest	1,166.66			
Interest	17,781.14	270,160.98		
Net Commercial and Selling Overhead		244,189.57		
of which chargeable against Cylinder Scales — 58.76%			143,485.79	
New Scales Sold — Plaintiff's Exhibit Number "9"		842,641.90		
Foreign Scales Sold — Plaintiff's Exhibit Number "9"		26,718.80		
Total Sales		869,360.70		
Less: Toledo Scales Charged Back		71,084.98		
Cylinder Sales $469,031.71, or 58.76% of total Sales		798,275.72		
Losses on Customers' Accounts — Zolg's Testimony			1,505.43	
Losses on Agents' Accounts — Zolg's Testimony			16,047.23	
Depreciation on Buildings — Zolg's Testimony			348.34	
Allowances for Exchange and Second-hand Scales, etc.:				
Exchange Scale Allowances		55,465.58		
Toledo Scale Allowances		22,650.26		
Special Allowances — Marring		4,918.71		
Special Allowances — Miscellaneous		8,544.01		
		91,578.56		
Less Sales:				
Second-hand Scales	8,518.30			
Refinished Toledo Scales	36,064.50			
Refinished Competition Scales	50,588.00			
Carried Forward	95,170.80	91,578.56	364,728.83	469,031.71

Plaintiff's Exhibit No. 40. 1943

PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES, Continued

Brought Forward				364,728.83	469,031.71
Allowance for Exchange and Second-hand Scales, etc., Continued:					
Brought Forward			$ 91,578.56		
Less Sales, Continued:					
Brought Forward		$ 95,170.80			
Deduct Charged Back:					
Second-hand Scales	$ 1,063.00				
Refinished Toledo Scales	2,011.50				
Refinished Competition Scales	6,224.00	9,298.50	85,872.30		
			5,706.26		
of which 58.76% applies to Sales of Cylinder Scales.					
To which Add:					
Allowance for Bad Debts—3% of $85,872.30			2,576.17		
Commission to Agents applicable to Second-hand Sales, etc.:					
Total Commissions		251,213.18			
Less: Charged Above		114,862.86			
Applicable to Other Sales		136,350.32			
Sales, Total New Sales, as above		798,275.72			
Second-hand Sales, etc., as above		85,872.30			
Total Sales		884,148.02			
Less: Cylinder Sales		469,031.71			
Total Sales other than Cylinder		415,116.31			
Second-hand Sales, etc. equal to 20.69% of $415,116.31 therefore add 20.69% of $136,350.32			28,212.68		
			36,495.11		
of which 58.76% is chargeable to this account				21,444.53	386,173.36
Net Profit on Manufacture and Sale of Cylinder Scales, before charging Interest					$ 82,858.35

PL. EX. 57.

Memorandum for Mr. Hansen regarding the work to be done on the Toledo Scale Company matter:

Referring to the analysis of the Commissions, concerning which you are no doubt familiar, we propose to obtain from the records of the Scale Company the following information:

A substantial number of Commissions entered in the latter months of 1910 on sales made in 1911 on the one hand; and a substantial number of Commissions entered on the latter months of 1911 on sales made in 1912. During the course of the examination you may discover a number of Commissions in the early months of both 1911 and 1912 on sales made in the previous years. If you can, without considerable digging, ascertain a number of these, it would be well to do so.

In preparing your schedules, keep both of the above classes of Commissions separate. In your division of any Commissions, adhere to the former division made, that is to say—Cylinder and Fan Commissions. In preparing your schedules, get all the information relative to the Voucher number, date of sale, the customers' names and the Agents' names. I do not think it will be necessary to take more than two months of each year—that is to say, the last two months of 1910 and the first two months of 1911, the last two months of 1911 and the first two months of 1912. This should give you a substantial number of the items desired.

During the course of the recent hearing great stress was laid by the Plaintiffs' counsel on the fact that there were a number of over-laps in allowances. Counsel for the Scale Co., Mr. Meads, desires to show that while there were a considerable number of over-laps of allowances made in 1911 on sales which were made in 1910 and prior, there are, on the other hand, a number of allowances in 1912 on sales made in 1911. Mr. Zolg has undertaken to indicate a large number of these latter items by placing slips of paper in the Customers Ledgers where these allowances have occurred. He has not undertaken to analyze the "Allowances" Account in order that all of these items may be obtained, but has picked them up indiscriminately.

Before you complete your work, ascertain the number of these allowances which they have indicated and have one of their clerks prepare a list, giving all the information, without analyzing the account.

At the time the test or estimated costs (Labor and Material) of Fan Scales were obtained, both Mr. Reeves and Mr. Mold did not in some cases furnish the correct information as regards the relation of one style of Fan Scale to another style of Fan Scale, in which cases some of the Fan Scales were under-priced and some were over-priced.

During our recent visit Messrs. Reeves and Mold went over the list a second time, and have now prepared what is, to their best knowledge and belief, the correct estimated cost of the Fan Scales sold in 1911. Before you return to Chicago obtain this document from Mr. Zolg and make sure that the extensions and footings are correct.

It is not intended that a great deal of time should be spent on this work, and it would seem that all this information can be obtained in four days at the outside. If, however, you find that a considerable amount of digging is required, after you have been on the work for one day, you had better request Mr. Zolg to furnish you with sufficient help so that there will be no delay, as the next hearing of this case occurs on Tuesday, December 19, and the information above will be required at that time.

(Signed) J. A. Bowman

Chicago, December 9 1916.

(Written in ink)

Where commissions are indicated in a/c Rec. Ledgers use different Color Slips.

Copy of Pltf. Ex. 57 for Iden: Admitted.

PL. EX. 69.

[Third Edition.]

(Cut)

A. D. 1877, 11th January. No. 148.

Weighing Machines.

Letters Patent to John Greenwood, of the City of Manchester, in the County of Lancaster, Weighing Machine Maker, for the Invention of "Improvements in Self-Indicating Weighing Machines."

Sealed the 10th July 1877, and dated the 11th January 1877.

Complete Specification filed by the said John Greenwood at the Office of the Commissioners of Patents on the 11th January 1877.

John Greenwood, of the City of Manchester, in the County of Lancaster, Weighing Machine Maker. "Improvements in Self-Indicating Weighing Machines."

The objects of this Invention are to enable the weight on the weighing machine to be readily and accurately indicated on the dial, and to effectually check the vibration without detriment to its accuracy.

My improvements in self-indicating weighing machinery consists in connecting a suspending vibrating paddle, which is immersed in a semicircular box or tank containing water, mercury, or other fluid. The suspended paddle is in connection with a three-armed lever, which connects the weighing machine with the dial, the vibration of the dial being checked by the suspended paddle, and this arrangement can be fixed either below or above the dial, no springs being required.

The paddle is made to perform a portion of a revolution by means of the three-armed lever connecting the weighing machine with the dial, and to the end of one arm of the lever is fixed a rack which works a pinion fixed on the dial spindle, and the paddle working in the semicircular box or tank which

contains the fluid is effectually checked from vibrating by the resistance of the fluid. To prevent back lash a strap is placed round the shaft of the pinion and connected to a weighted lever, which brings the teeth to bear at the same side at all times when at rest, and to one arm of the three armed lever can be attached a counter-balance for receiving weights to weigh heavier loads.

On the lower arm of the three armed lever is a weight for adjusting and balancing the machine, which weight may be raised or lowered by means of screws and nuts, and moved outwards or inwards by another screw from the side of the machine.

The objects of this Invention are to enable the weight on the weighing machine to be readily and accurately indicated on the dial, and to effectually check the vibration without detriment to its accuracy.

The nature of my improvements will be readily understood by the following description thereof, reference being had to the figures and letters on the accompanying Sheet of Drawings, in which Fig. 1 is a plan, part in section; Fig. 2 a front view; and Fig. 3, a side view, part in section.

In the various Figures *a* represents the box or framework of the machine to which connected a suspended vibrating paddle *b* balanced by the adjusting nut and screw *c*, the paddle being immersed in a semicircular box or tank *d* containing water, mercury, or other fluid. The suspended paddle *b* is in connection with a three-armed lever *e*, *f*, *g*, (the bearing or fulcrum being marked *h*) which connects the weighing machine with the dial, the vibration of the dial being checked by the suspended paddle *b*.

The paddle is made to perform a portion of a revolution by means of the three armed lever *e*, *f*, *g*, connecting the weighing machine with the dial, and to the end of one arm of the lever is fixed a rack *i*, which works a pinion *j* fixed on the dial spindle, and the paddle *b* working in the semicircular box or tank *d* which contains the fluid is effectively checked from vibrating by the resistance of the fluid.

To prevent back lash in the rack and pinion a strap *k* is placed round the shaft of the pinion *j* and connected to the weighted lever k^1 which encircles the dial spindle, which arrangement brings the teeth to bear at the same side at all times when at rest; and to one arm *f* of the three-armed lever can be attached a counter-balance for receiving weights to weigh higher numbers.

For ascertaining and denoting the tare I place a weight *l* on the lever *f* of the three-armed lever *e, f, g*. The weight *m* on the lever *g* of the three-armed lever *e, f, g*, is for adjusting and balancing the machine, and can be raised and lowered by a screw *n* and nuts *o* for adjusting, and moved outwards or inwards for balancing by placing a key on the end of the screw *p*, and the rod *q* is to convey the weight from the platform to the three-armed lever.

This Invention is of great utility in weighing rapidly and accurately where continuous loads are passing over, as at colliery pit banks, railway depots, and other places where economy of time and labor are considered, as the weights are checked or read off without stoppage of traffic.

Having now described the nature and particulars of my said Invention, and the manner in which the same is to be performed, I desire it to be understood that I claim in self-indicating weighing machines,—

First. The suspended vibrating paddle *b* immersed in a box or tank *d* containing water or other fluid, as and for the purposes shewn and described.

Secondly. The three-armed lever *e, f, g*, as and for the purposes shewn and described.

Thirdly. The sliding weight *m* for adjusting and balancing the machine, as shewn and described.

And, Fourthly. The weighted lever and arrangements connected therewith for dispensing with the back lash in the rack and pinion, as shewn and described.

In witness whereof, I, the said John Greenwood, have hereunto set my hand and seal, this Twenty-eighth of November, in the year of our Lord One thousand eight hundred and seventy-six.

JOHN GREENWOOD. (L. S.)

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A.D. 1877, Jan. 11. N° 168.
GREENWOOD'S COMPLETE SPECIFICATION.

Fig 1

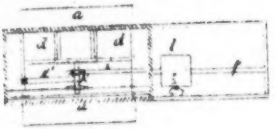


Fig 2.

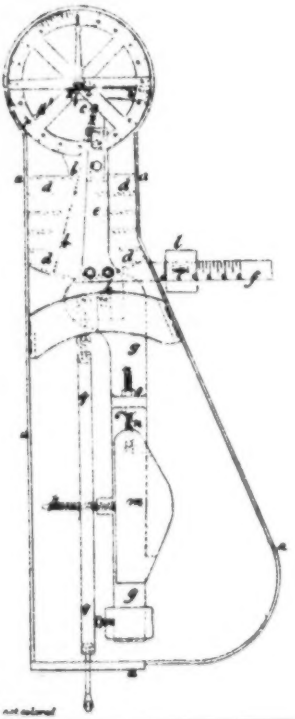
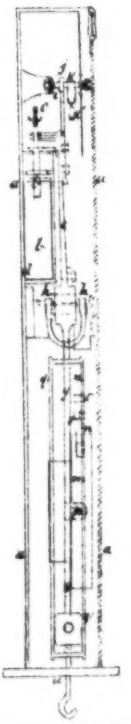


Fig 3



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PL. EX. 70.

[Second Edition.]
No. 5009 (Cut) A. D. 1888

Date of Application, 4th Apr, 1888

Complete Specification Left, 16th Aug., 1888—Accepted, 21st Sept., 1888

Provisional Specification.

Improvements in Self-indicating Weighing Machines.

We, Joseph Cartwright of 13, Myrtle Terrace, Cross Lane, Salford, fitter and Joseph Wilbraham Cartwright of 35, Washington Street, Pendleton, Salford, in the County of Lancaster, pattern maker, do hereby declare the nature of this invention to be as follows:—

Our invention relates to that class of weighing machines known as self-indicating or pendulous lever weighing machines. In these a Tee shaped or double bell-crank lever is suspended on knife edges on the frame and the connecting rod from the transfer lever transferring the load on the weighing table to the machine is suspended on knife edges in one of the horizontal arms while the vertical arm is loaded with an adjustable weight. To the horizontal arms two graduated steel yards with sliding weights are fixed, one of which serves to indicate the tare of the tubs, corves, boxes, or vessels containing the coal or other articles to be weighed, while the other can be adjusted so that it balances the minimum net weight of coal or other contents ordinarily contained therein & the pendulous weight is used only to indicate the excess. This is ordinarily done by means of a finger moving in front of a graduated index sector and actuated by a pin in the pendulous lever fitting into a slot in the finger, which latter vibrates on a fulcrum fixed to the frame of the weighing machine.

This arrangement causes the arcs through which the finger moves for equal increases of the load to vary and the divisions on the index sector to be unequal, and they have to be made experimentally after the machine is finished by loading the weighing table with standing weights. One of our improvements consists in arrangeing the index finger so that

it vibrate on a fulcrum fixed to the pendulous vertical lever and prolonging it on the other side of the fulcrum and guiding the end in a straight or approximately straight line. For this purpose we attach by preference a bracket to the pendulous lever and support the index finger in it by means of centre pointed adjustable screws fitting into countersinks on the finger. The lower end of the finger we connect to a horizontal link vibrating on a fixed fulcrum, similar centre punch bearings being made use of for the joints. By this arrangement equal divisions on the index sector can be obtained for equal increases of the load within the limits of weights for which such pendulous lever machines are constructed.

To the bottom of the pendulous lever we attach a paddle working in a cistern containing water for the purpose of Stopping undue vibration of the lever and bringing the same sooner to a state of rest.

When the taring and minimum sliding weights are at zero on their steel yards, the finger must also be at zero on the index sector and for this purpose ordinarily a further weight has to be adjusted upon the transfer lever. To obviate this we fix the two steel yards to brackets adjustable on the horizontal arms of the pendulous lever or otherwise make the steel yards adjustable on the horizontal arms, instead of fixing them immoveably as usual. By moving the steel yards with their weights bodily along the horizontal arms the machine can be balanced as required.

Dated this 3rd day of April 1888.

EMMOTT & Co.
Agents for the Applicants.

Complete Specification.

Improvements in Self-indicating Weighing Machines.

We, Joseph Cartwright of 13, Myrtle Terrace, Cross Lane, Salford, fitter and Joseph Wilbraham Cartwright of 35, Withington Street, Pendleton, Salford, in the County of Lancaster pattern maker, do hereby declare the nature of this invention and in what manner the same is to be performed, to be particularly described and ascertained in and by the following statement:—

Our invention relates to that class of weighing machine known as self-indicating or pendulous lever weighing machines. In these a Tee shaped or double bellcrank lever is suspended on knife edges on the frame and the connecting rod from the transfer lever transferring the load on the weighing table to the machine is suspended on knife edges in one of the horizontal arms, while the vertical arm is loaded with an adjustable weight. To the horizontal arms two graduated steelyards with sliding weights are fixed, one of which serves to indicate the tare of the tubs corves boxes or vessels containing the coal or other articles to be weighed, while the other can be adjusted so that it balances the minimum net weight of coal or other contents ordinarily contained therein and the pendulous weight is only used to indicate the excess. This is ordinarily done by means of a finger vibrating in front of a graduated index sector and actuated by a pin in the pendulous lever fitting into a slot in the finger, which latter vibrates on a fulcrum fixed to the frame of the weighing machine. This arrangement causes the arcs through which the finger moves for equal increases of the load and the divisions on the index sector to be unequal, and they have to be made experimentally after the machine is finished by loading the weighing table with standard weights. The object of our invention is to obviate this inconvenience by connecting the index finger to the pendulous lever in such a manner that the divisions on the graduated sector become equal for equal increases of the load.

On the drawing appended hereunto figure 1 shows a front view, fig. 2 a side view and fig. 3 a top view of a self-indicating weighing machine fitted with our improved arrangement, figs. 4 and 5 showing details.

a is the frame or pillar of the machine upon which the Tee shaped lever b b^1 b^2 is suspended with knife edges a^1. This lever is shown made in three parts for convenience of manufacture, the horizontal beam b being formed with a short vertical arm b^3 to which the vertical bars b^1 and b^2 are attached by screws, one bar at the front and the other at the back of the pillar *a*, but these bars may be welded to the horizontal beam or attached in any other ordinary suitable way. The arms b^1 and b^2 form the vertical pendulous lever hereinbefore referred to. To the former the adjustable weight *c* is attached; *d* is the connecting rod suspended upon knife edges d^1 in the lever *b*, which connects the transfer

lever receiving or supporting the load on the weighing table to the machine. *e* and *f* are the two steelyards attached to the horizontal part *b* of the pendulous lever, the upper steelyard carrying the sliding weight e^1 which is adjusted so as to balance the minimum net weight of material to be weighed, while the lower steelyard *f* carries the sliding weight f^1 which is adjusted to balance the tare of the receptacles for the material to be weighed. *g* is the index sector and *h* a finger indicating the excess of weight over the minimum net weight. These parts are similar to those ordinarily used and form no part of our invention.

Ordinarily the finger *h* is arranged to vibrate on a fulcrum fixed to the pillar *a* and is actuated by a pin in the pendulous lever b^1, or b^2 fitting into a slot of the finger *h*, whereby the inconveniences herein before described are produced. Our improvement consists in arranging the finger so that it vibrates on a fulcrum fixed to the pendulous lever and prolonging the finger to the other side of the fulcrum and guiding the end in a straight or approximately straight line. As shewn on the drawing, we fix upon the pendulous lever b^2 a stud *i* with a knife edge i^1 on which the finger *h* vibrates, the finger being formed with an opening h^1 into which a steel plate h^2 is inserted and rests upon the knife edge i^1, as is shewn in detail by fig. 4.

The lever *h* is connected at its lower end h^3 to a rod *k* with forked end k^1 by a pin or equivalent means. A bracket *l* bolted to the arm *m* cast or attached to the pillar *a* has a ring *n* bolted to it, the inner edge of which is knife shaped at the front and serves as fulcrum to the rod *k* hooked upon it as shewn in detail by fig. 5. The other end of the rod *k* connected to the finger *h* is arranged to be vertically below the knife edges on the pillar *a* supporting the pendulous lever. The steelyards *e* and *f* are carried by carriers b^4 b^5 arranged to clip the horizontal arm *b* of the pendulous lever and adjustable on the same, by means of which arrangement the steelyards can be shifted on said arm so that when the table of the weighing machine is not loaded and the weights e^1 and f^1 are put at zero, the pendulous lever and finger *h* are in the positions shewn on the drawing with the finger at zero, and the use of additional weights on the transfer lever to effect this adjustment is hereby obviated. On the weight e^1 being set to the minimum weight of material to be contained in the receptacles to be weighed and the weight f^1 to balance the tare, the finger will also be at zero when a

receptacle containing this weight is on the weighing table, and additional weights in the receptacle will cause the finger to move to the right and indicate the excess. The divisions for equal increases of the load will be equal, as the length of the arms of the finger do not vary in different positions of the pendulous lever, as is the case when the finger vibrates on a fulcrum fixed to the pillar *a* and is moved by a pin on the lever b^1 or b^2 working in a slot of the finger, or a pin on the finger working in a slot in the lever b^1 or b^2.

The end of the lever arm b^1 has attached to it a paddle *o* working in a cistern o^1 containing liquid for the purpose of obviating or reducing oscillations of the pendulous lever. A sliding weight *p* is arranged on the lever arm *b* to balance variations in the weight of the weighing table or platform caused by changes in the weather or collection of rain on the same.

Instead of the knife edged fulcra used for the rod *k* and finger *h* centre pointed adjustable pins or screws placed opposite each other in one of the parts and fitting into counter sinks on the other part may be used. It is obvious that the finger *h* may be arranged to vibrate in front of the pillar *a* and be actuated by the arms b^1 instead of being placed at the back as shewn and actuated by the arm b^2.

Having now particularly described and ascertained the nature of our said invention and in what manner the same is to be performed, we declare that what we claim is,

In selfindicating weighing machines arranging the index finger *h* so that it vibrates on a fulcrum *i* upon the pendulous lever and prolonging the finger to the other side of said fulcrum and guiding the end h^3 in an approximately straight vertical line by means of a link *k*, substantially as herein before described and illustrated.

Dated this 15th day of August 1888.

EMMOTT & Co.,
Agents for the Applicants.

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A.D. 1888. April 4. N° 5009.

931 1959

J. & J. W. CARTWRIGHT'S Complete Specification.

(2nd Edition)

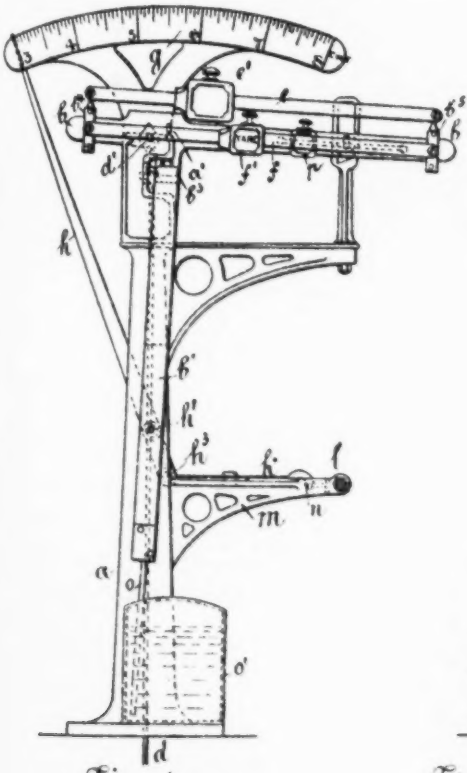

Fig. 1.

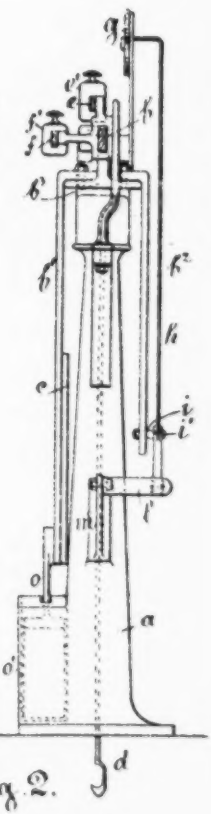

Fig. 2.

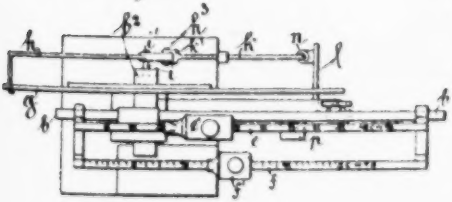

Fig. 3.

Fig. 4.

Fig. 5.

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PLTF. EX. 74.

The President of the United States of America, To all to whom these Presents shall come, Greeting:

Know Ye, That we having inspected the records and files of the District Court of the United States for the Southern District of New York, do find certain paper writings there, remaining of record, in the words and figures following, to wit:

CIRCUIT COURT OF THE UNITED STATES

Southern District of New York.

The Computing Scale Company, and Jonathan B. Hayward, *Complainants,* *vs.* Toledo Computing Scale Company, *Defendant.* } In Equity No. Patent No. 937,573.

To the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York:

The Computing Scale Company, a corporation organized and existing under and by virtue of the laws of the State of Ohio and a citizen of said State, and having its principal office located in the City of Dayton, County of Montgomery and State of Ohio, and Jonathan B. Hayward, a citizen of the United States residing in the City of New York, State of New York, and having an office and regularly established place of business in said City and in the Southern District of New York, complainants, bring this their bill of complaint against the Toledo Computing Scale Company, a corporation organized and existing under and by virtue of the laws of the State of New Jersey, having an office and a regularly established place of business in the City of New York, Borough of Manhattan, State of New York, and in the Southern District of said State, defendant; and thereupon your orators complain and say:

1. That your orator, The Computing Scale Company, is a corporation duly organized, incorporated and existing under and by virtue of the laws of the State of Ohio and a

citizen of said State, having its principal offices or place of business located in the City of Dayton, County of Montgomery and State of Ohio, and that your orator, Jonathan B. Hayward, is a citizen of the United States residing in the City of New York, Borough of Manhattan, in the State of New York, and a citizen of said State, and having a regular and established place of business located in said City of New York, State of New York, and in the Southern Judicial District thereof; that the defendant, Toledo Computing Scale Company, is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey and a citizen of said State, having a regular and established place of business located in the City of New York, Borough of Manhattan, State of New York, and in the Southern Judicial District thereof, in which the acts of infringement hereinafter complained of were committed.

II. And your orators further show unto your Honors that heretofore, before the 12th day of June, 1908, Harry H. Bane and Samuel G. Crane, both citizens of the United States residing at Kansas City, in the County of Jackson and State of Missouri, became and were the original, first and joint inventors or discoverers of certain new and useful improvements in illuminating apparatus for scales, fully shown, described and claimed in letters patent of the United States hereinafter mentioned, which improvements in illuminating apparatus for scales were not known or used by others in this country before their invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country before their invention or discovery thereof or more than two years prior to their application for the letters patent of the United States hereinafter mentioned, and not in public use or on sale in this country for more than two years prior to their application for said letters patent of the United States, and that said inventions or improvements had not been patented in any country foreign to the United States on an application filed more than twelve months prior to said application for letters patent of the United States, and that said inventions and improvements had not been abandoned to the public.

III. And your orators further show unto your Honors that by a deed of assignment in writing dated the 10th day of June, 1908, duly signed, sealed and delivered and recorded in the United States Patent Office, the said Harry H. Bane and Samuel G. Crane did assign an undivided one-third

interest in said inventions or improvements and in letters patent which might be granted thereon, to William J. Freeman, of Kansas City, Missouri, and that afterwards to wit: on the 23rd day of January, 1909, the said Harry H. Bane and Samuel G. Crane and William J. Freeman did, by a deed of assignment in writing duly signed, sealed, delivered and recorded in the United States Patent Office, sell, assign, transfer and set over unto Jonathan B. Hayward the entire right, title and interest in and to said inventions or improvements and any and all letters patent of the United States which might be granted covering or securing the same; and that afterwards, to wit: on the 23rd day of September, 1909, the said Jonathan B. Hayward did, by a deed of assignment in writing bearing said date, duly signed, sealed and delivered, sell, assign, transfer and set over unto Henry B. Pruden, Earl R. Lines and Charles B. Longstreth, of Dayton, Ohio, the entire right, title and interest in and to said inventions or improvements and application for letters patent, and any and all letters patent of the United States which might be granted covering or securing the same—being an undivided one-third interest in said inventions and improvements, etc., to each of said assignees,—which said assignment was, recorded in the United States Patent Office in books kept for the purpose—Liber G 82, page 412; which assignments or duly certified copies thereof your orators stand ready here in Court to produce as your Honors may direct.

IV. And your orators further show unto your Honors, that the said Harry H. Bane and Samuel G. Crane, being the original, first and joint inventors of said improvements in illuminating apparatus for scales, did, on or about the 12th day of June, A. D. 1908, make application in writing to the Commissioner of Patents of the United States, and did file in the Patent Office on or about said date a written description of their invention and of the manner of making, constructing, compounding and using the same, in full, clear, concise and exact terms, and in the best mode in which they then contemplated applying their invention, particularly pointing out and distinctly claiming the improvements which they claimed as their inventions or discovery, duly signed and attested in accordance with the then existing laws of Congress; and having duly complied in all essential respects with the requirements of said laws of Congress, and after due proceedings had thereon, on the 19th day of October,

1909, letters patent in the name of the United States of America, under the seal of the Patent Office, signed by the Commissioner of Patents and recorded, together with the specification thereof, in the Patent Office, in books kept for that purpose, and numbered 937,573, were issued to Harry H. Bane and Samuel G. Crane, of Kansas City, Missouri, assignors, by direct and mesne assignments of one-third to Henry B. Pruden, one-third to Earl R. Lines, and one-third to Charles B. Longstreth, all of Dayton, Ohio, the day and year last aforesaid, and numbered 937,573, whereby there was granted and secured to the said Henry B. Pruden, Earl R. Lines and Charles B. Longstreth, their heirs or assigns, for the term of seventeen years from and after the date of said letters patent, the full and exclusive right and liberty of making, using and vending, throughout the United States of America and the territories thereof, the improvements or inventions therein shown, described and claimed, a description whereof is more fully set forth in the specifications and drawings thereof, and a duly authenticated or certified copy of which is hereto attached and made a part hereof.

V. And your orators further show unto your Honors that on the 27th day of December, 1909, the said Henry B. Pruden, Earl R. Lines and Charles B. Longstreth did, by a deed of assignment in writing duly signed, sealed and delivered, and recorded in the United States Patent Office on the 15th day of January, 1910, sell, assign, transfer and set over unto the said Jonathan B. Hayward, of the City of New York, State of New York, their entire right, title and interest in and to said inventions or improvements and in said letters patent, each of said parties assigning his undivided one-third interest in said inventions or improvements and in said letters patent, including all rights of recovery for past infringement of said letters patent, which assignment, or a duly authenticated copy thereof, your orators will here in Court produce as your Honors may direct.

VI. And your orators further show to your Honors that heretofore, and on or about the 27th day of December, 1909, the said Jonathan B. Hayward did, by a deed in writing, grant unto your orator, the said Computing Scale Company, the exclusive license to make, use and sell said inventions or improvements under said letters patent No. 937,573, which deed in writing was duly signed, sealed and delivered, and recorded in the United States Patent Office on January 15, 1910, whereby your orators became and are the sole and ex-

clusive owners of the entire right, title and interest in and to said inventions or improvements and in and to said letters patent, and are exclusively entitled to bring this suit against the defendant named herein.

VII. And your orators further show unto your Honors that said inventions or improvements in illuminating apparatus for scales, shown, described and claimed in said letters patent No. 937,573, have been and are of great benefit and advantage to your orators, and that they have invested and expended large sums of money and been to great trouble and expense in and about said inventions or improvements in illuminating apparatus for scales, for the purpose of introducing them into public use and making them profitable and useful to the public; that said improvements or inventions have been and are of great utility and value and of great benefit to the public, and have become widely and favorably known throughout the United States of America and foreign countries, a great demand for such scales having been created within the United States; that your orators are able and desirous of supplying all demands of the public for such scales; that the public generally have acknowledged and acquiesced in the validity of said letters patent No. 937,573, and in the exclusive right secured to your orators thereby, and that your orators believe that they will realize and receive large gains and profits from said improvements or inventions if the defendant herein be enjoined from continuing its infringement of said letters patent.

VIII. And your orators further show unto your Honors that they are informed and believe, and therefore aver, that at divers times between the dates of the grant of said letters patent and the filing of this bill of complaint by complainants, and particularly at divers times between the date when your orators acquired the entire right, title and interest in and to said letters patent No. 937,573, and the filing of this bill of complaint, the defendant herein, well knowing the facts herein set forth, but contriving to injure your orators and deprive them of the benefits and advantages which might and otherwise would accrue to them from said letters patent, and the improvements or inventions in illuminating apparatus for scales therein shown, described and claimed, have been and now are engaged in manufacturing, selling and using, and causing others to use, illuminating apparatus for scales embodying the inventions or improvements shown, described and claimed in said letters patent, and constructed

in the manner set forth and particularly claimed therein, in the City of New York, Borough of Manhattan, State of New York, and within the Southern Judicial District thereof, and elsewhere within the United States, without any license or allowance of your orators or their predecessors, and against their will and in violation of their rights, and in infringement of said letters patent; that the defendant, as your orators are informed and believe and therefore aver, intends and threatens to manufacture, sell and use, and cause others to use, illuminating apparatus for scales embodying the improvements and inventions shown, described and claimed in said letters patent No. 937,573, and constructed in accordance with said letters patent, and particularly claimed therein, in said City of Greater New York and elsewhere within the United States, without any license or allowance of your orators or their predecessors and against their will, and in defiance of their rights as acquired and secured to them under said letters patent, and in infringement thereof; by reason whereof your orators are being deprived of great gains and profits which might and otherwise would have been obtained by them, but which have been and are now being received and enjoyed by the said defendant by and through its aforesaid unlawful acts and doings; and that your orators are unable to state how many of said illuminating apparatuses for scales the defendant has made, sold or used, or caused others to make, sell or use, or to what extent it has made, sold or used the same; but they are informed and believe, and therefore aver, that the defendant has made, sold and used, and caused others to make, sell and use, a very large number of such scales embodying the improvements or inventions shown, described and claimed in said letters patent and constructed in accordance therewith, as particularly claimed, in said City of New York and elsewhere within the United States of America, in infringement of said letters patent, and pray the discovery thereof.

IX. And your orators further show unto your Honors that they have given notice to the public, by causing the scales manufactured, sold and used by them under and in accordance with the aforesaid letters patent 937,573 to be marked with the day and year of said letters patent, in strict accordance with Section 4900 of the Revised Statutes of the United States of America in such cases made and provided, by affixing thereto the word "Patented" together with the day and year on which said letters patent were issued and

granted; that they have given particular notice to said defendant of its infringement of said letters patent of the United States, No. 937,573, and have requested it to desist therefrom, and that said defendant has continued, and still continues, after such notice and request, to make, sell and use scales in violation and in infringement of said letters patent, and still persists in said unlawful acts and doings in infringement of said letters patent; that the said defendant still continues to make, sell and use scales containing and embodying the inventions or improvements embodied and contained in letters patent No. 937,573, without any allowance from your orators or their predecessors, and without any lawful right as aforesaid, in infringement of said letters patent, and that such unlawful acts of said defendant and disregard and violations of the just rights of your orators, as aforesaid, have the effect to and do encourage others to disregard the rights of your orators as aforesaid.

All of which acts, doings and pretenses are contrary to equity and good conscience and tend to the manifest wrong and injury of your orators in the premises.

X. In consideration whereof, and forasmuch as your orators can have no adequate relief in the premises except in this Court, where matters of this nature are properly cognizable and relievable, to the end, therefore, that the defendant may, if it can, show cause why your orators should not have the relief hereby prayed and may, according to the best and utmost of its knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the premises and to all of the several matters hereinbefore stated, charged and alleged, as fully and particularly as if interrogated as to each and every of said matters (but not under oath, an answer under oath being hereby expressly waived), and may be compelled to account for and pay over to your orators the profits, gains and savings by it acquired and the damages suffered by your orators from said unlawful acts, and to account for and pay over to your orators all such profits, gains and savings as have accrued to and arisen or been earned or received by the said defendant, or to which your orators may be entitled by reason of such unlawful making, selling and using, by the defendant, of scales embodying the improvements or inventions shown, described and claimed in said letters patent No. 937,573, and all such gains and profits as your orators would have received but for the said unlawful acts and doings of defendant.

Wherefore your orators pray:

1. That the defendant may answer the premises but not under oath, an answer under oath being hereby expressly waived.

2. That the defendant, its officers, directors, clerks, servants, agents, attorneys and employes, and each of them, may be enjoined perpetually, and also preliminarily, during the pendency of this suit, from infringing said letters patent.

3. That the defendant may be compelled to account to your orators for all scales made, sold and used by it in violation of your orators' exclusive rights as aforesaid and in infringement of said letters patent, and also all moneys received therefrom or thereby, and may be decreed to pay over to your orators any and all profits, gains and savings made or derived by it from the making, selling and using of all scales made, sold and used by it in violation of your orators' rights and in infringement of said letters patent, together with all damages suffered by your orators from said unlawful acts of the defendant, and to which your orators may be lawfully entitled.

4. That your Honors will increase the actual damages to be so assessed to a sum equal to three times the amount of such assessment under the circumstances of the wilful and unjust infringement by the defendant, as herein set forth.

5. That the defendant may be decreed to pay the costs of this suit.

And for other and further relief may it please your Honors to grant unto your orators:

1. A writ of subpoena of the United States of America, in due and usual form and under the usual penalties, directed to the defendant, Toledo Computing Scale Company, commanding it to appear and answer to this bill of complaint, but not under oath, an answer under oath being hereby expressly waived, and to abide by and perform such order and decree in the premises as to the Court shall seem meet and shall be required by the principles of equity and good conscience.

2. A writ of injunction restraining the defendant, its officers, directors, clerks, servants, agents, attorneys, and employes, and each of them, during the pendency of this suit, from further using scales embodying the improvements or inventions shown, described and claimed in said letters patent, and from infringing said letters patent, or in any way violating the rights of your orators thereunder.

3. A writ of injunction restraining the defendant, its officers, directors, clerks, servants, agents, attorneys and employees, and each of them, perpetually, from making, selling and using scales embodying the improvements or inventions shown, described and claimed in said letters patent, and from infringing said letters patent, or in any way violating the rights of your orators thereunder.

All duly sealed and attested in due and usual form and under the usual penalties, and directed to the defendant, Toledo Computing Scale Company.

And such other and further relief as equity and good conscience may require and to your Honors shall seem meet.

And your orators will ever pray, etc.

THE COMPUTING SCALE CO.
By E. CANBY,
Treas.

(Seal)

JONATHAN B. HAYWARD
KERR, PAGE, COOPER & HAYWARD,
Solicitors for Complainants.
SHERIDAN, WILKINSON, SCOTT & RICHMOND,
J. B. HAYWARD,
Of Counsel.

State of Ohio, }
County of Montgomery. }

On this 8th day of September, 1911 before me, a Notary Public in and for the County and State aforesaid, personally appeared E. Canby who, being by me duly sworn, did depose and say that he is the Treasurer of The Computing Scale Co. the complainant corporation named in the foregoing bill of complaint; that he has read and the said bill and knows the contents thereof; that the said bill of complaint is true of his own knowledge, except as to matters therein stated to be on information and belief, and as to these he believes it to be true; that he is duly authorized to sign said bill of complaint for said complainant corporation; that he verily believes the said Harry E. Bane and Samuel G. Crane named in said bill of complaint were the first, original and joint inventors of the improvements in computing and price scales shown, described and claimed in letters patent No. 937,573, referred to in said bill of complaint, and upon which this suit is brought; and that he verily believes the said letters patent to be in all respects good and valid

in law and the title thereto vested in the complainants, as alleged in said bill of complaint.

E. CANBY

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal this day and year first aforesaid.

GEO. W. KEPLER,
Notary Public.

(Seal)

State of New York, } ss:
County of New York. }

On this 6th day of September A. D. 1911, before me, a Notary Public in and for the County and State aforesaid, personally appeared Jonathan B. Hayward who, being by me duly sworn, did depose and say that he is the same Jonathan B. Hayward named in the foregoing bill of complaint; that he has read the said bill and knows the contents thereof; that the said Bill of Complaint is true of his own knowledge, except as to matters therein stated to be on information and belief, and as to those he believes it to be true; that he is duly authorized to sign said bill of complaint; that he verily believes the said Harry H. Bane and Samuel G. Crane named in said bill of complaint were the first, original and joint inventors of the improvements in computing and price scales shown, described, and claimed in said bill of complaint, and upon which this suit is brought; and that he verily believes the said letters patent to be in all respects good and valid in law and the title thereto vested in the complainants, as alleged in said bill of complaint.

JONATHAN B. HAYWARD

In Witness Whereof I have hereunto set my hand and affixed my Notarial Seal the day and year first aforesaid.

M. LAWSON DYER
Notary Public. 86
N. Y. Co. N. Y.

(Seal)

(Endorsed) Circuit of the United States, for the Southern District of New York. The Computing Scale Co., and Jonathan B. Hayward, vs. Toledo Computing Scale Co. (Copy) Bill of Complaint.

Endorsed: U. S. Circuit Court Southern District N. Y. Filed Sep. 11-1911 John A. Shields Clerk

Plaintiff's Exhibit No. 74. 1971

IN THE UNITED STATES CIRCUIT COURT

Southern District of New York.

The Computing Scale Company and Jonathan B. Hayward, *Complainants,* *vs.* Toledo Computing Scale Company, *Defendant.* } In Equity No.

ANSWER.

The answer of Toledo Computing Scale Company, defendant, to the bill of complaint of The Computing Scale Company and Jonathan B. Hayward, complainants:

This defendant, now and at all times hereafter saving and reserving unto itself all and all manner of benefit and advantage of exception which can or may be had or taken to the manifold errors, uncertainties, insufficiencies and imperfections in the said bill of complaint contained, for answer thereto, or to so much and such parts thereof as it is advised it is material or necessary for it to make answer unto, answering says:

I.

It denies each and every allegation in said bill of complaint contained, except as hereinafter admitted or otherwise specifically answered.

II.

It is not informed, save by said bill of complaint, whether the complainant, The Computing Scale Company, is a corporation duly organized, incorporated and existing under and by virtue of the laws of the State of Ohio and a citizen of said State and having its principal office or place of business located in the City of Dayton, County of Montgomery and State of Ohio, or whether the complainant Jonathan B. Hayward is a citizen of the United States residing in the City of New York, Borough of Manhattan, in the State of New York, and a citizen of said State, and having a regular and established place of business located in said City of New

York, State of New York, and in the Southern District thereof; and therefore denies the allegations of the bill of complaint in these respects and leaves complainants to their proofs thereof.

III.

It admits that the defendant, Toledo Computing Scale Company, is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey and that it has a regular and established place of business located in the City of New York, Borough of Manhattan, State of New York, and Southern Judicial District thereof, but denies that it has there or elsewhere committed any of the acts of infringement alleged in said bill of complaint.

IV.

It denies that before the twelfth day of June, 1908, or at any time, Harry H. Bane and Samuel G. Crane, citizens of the United States, residing at Kansas City, in the County of Jackson and State of Missouri, or as citizens or residents elsewhere, became and were the original, first and joint inventors of discoverers of certain new and useful improvements in Illuminating Apparatus for Scales disclosed in Letters Patent of the United States No. 937,573; and it further denies that said alleged improvements were not known or used by others in this country before their alleged invention or discovery thereof, denies that said improvements were not patented or described in any printed publication in this or any foreign country before their alleged invention or discovery thereof or more than two years prior to their application for the said Letters Patent of the United States, denies that said alleged improvements were not in public use or on sale in this country for more than two years prior to their said application for Letters Patent of the United States, denies that said alleged inventions or improvements had not been patented in any country foreign to the United States on an application filed more than twelve months prior to their said application for Letters Patent of the United States, and denies that said alleged inventions and improvements had not been abandoned to the public.

V.

It avers, on information and belief, that prior to the alleged invention or discovery by the said Harry H. Bane and Samuel G. Crane of the alleged improvements described and claimed in said Letters Patent, the same and every material part thereof had been known and used by others in this country and had been patented and described in printed publications in this and other countries and had been so patented and described more than two years prior to the application of said Bane and Crane for said Letters Patent of the United States, and that said alleged inventions or improvements had been patented in countries foreign to the United States on applications filed more than twelve months prior to said applications of said Bane and Crane for Letters Patent of the United States, and that the said alleged inventions and improvements and every material part thereof had been in public use and on sale in this country for more than two years prior to the application of said Bane and Crane for said letters patent, and had been abandoned to the public.

VI.

It is not informed, save by said bill of complaint, whether by a deed of assignment in writing dated the 10th day of June, 1908, duly signed, sealed, delivered and recorded in the United States Patent Office, the said Harry H. Bane and Samuel G. Crane did assign an undivided one-third interest in said inventions or improvements and in Letters Patent which might be granted thereon, to William J. Freeman, of Kansas City, Missouri, or that afterwards, to-wit, on the 23rd day of January, 1909, the said Harry H. Bane and Samuel G. Crane and William J. Freeman did, by a deed of assignment in writing duly signed, sealed, delivered and recorded in the United States Patent Office, sell, assign, transfer and set over unto Jonathan B. Hayward the entire right, title and interest in and to said inventions and improvements and any and all Letters Patent of the United States which might be granted covering or securing the same; or that afterwards, to-wit, on the 23rd day of September, 1909, the said Jonathan B. Hayward did, by a deed of assignment in writing bearing said date, duly signed, sealed and delivered, sell, assign, transfer and set over unto Henry B. Pruden,

Earl R. Lines and Charles B. Longstreth, of Dayton, Ohio, the entire right, title and interest in and to said inventions or improvements and application for Letters Patent and any and all Letters Patent of the United States which might be granted covering or securing the same—being an undivided one-third interest in said inventions and improvements to each of said assigns—which said assignment was recorded in the United States Patent Office in books kept for the purpose; and therefore denies the allegations of the bill of complaint in these respects and leaves complainants to their proofs thereof.

VII.

It is not informed, save by said bill of complaint, whether the said Harry H. Bane and Samuel G. Crane did, on or about the 12th day of June, A. D. 1908, make application in writing to the Commissioner of Patents of the United States and file in the Patent Office on or about said date a written description of their alleged invention and of the manner of making, constructing, compounding and using the same, in full, clear, concise and exact terms and in the best mode in which they then contemplated applying their invention, particularly pointing out and distinctly claiming the improvements which they claim as their inventions or discovery, or that said written description was duly signed and attested in accordance with the then existing laws of Congress; nor is it informed, save by said bill of complaint, that, having duly complied in all essential respects with the requirements of said laws of Congress and after due proceedings had thereon, on the 19th day of October, 1909, Letters Patent in the name of the United States of America, under the seal of the Patent Office, signed by the Commissioner of Patents and recorded, together with the specifications thereon, in the Patent Office in books kept for that purpose, and numbered 937,573, were issued to Harry H. Bane and Samuel G. Crane, of Kansas City, Missouri, assignors, by direct and mesne assignments of one-third to Henry B. Pruden, one-third to Earl R. Lines and one-third to Charles B. Longstreth, all of Dayton, Ohio, the day and year last aforesaid; and therefore denies the allegations of the bill of complaint in these respects and leaves complainants to their proofs thereof; and it further denies that, by said alleged Letters Patent No. 937,573 there was granted and secured to the said Henry B. Pruden, Earl R. Lines and

Charles B. Longstreth, their heirs and assigns, for the term of seventeen years from and after the date of said Letters Patent, the full and exclusive right and liberty of making, using and vending throughout the United States of America and the Territories thereof, the improvements or inventions alleged to be shown, described and claimed therein.

VIII.

It is not informed, save by said bill of complaint, whether on the 27th day of December, 1909, the said Henry B. Pruden, Earl R. Lines and Charles B. Longstreth did, by a deed of assignment in writing duly signed, sealed, delivered and recorded in the United States Patent Office on the 15th day of January, 1910, sell, assign, transfer and set over unto the said Jonathan B. Hayward, of the City of New York, State of New York, their entire right, title and interest in and to said inventions or improvements and in said Letters Patent, each of said parties assigning his undivided one-third interest in said inventions or improvements and in said Letters Patent, including all rights of recovery for all past infringement of said Letters Patent; and therefore denies the allegations of the bill of complaint in these respects and leaves complainants to their proofs thereof.

IX.

It is not informed, save by said bill of complaint, whether on or about the 27th day of December, 1909, the said Jonathan B. Hayward did, by deed in writing, grant unto the said The Computing Scale Company the exclusive license to make, use and sell said alleged inventions or improvements under said Letters Patent No. 937,573, which deed in writing was duly signed, sealed and delivered and recorded in the United States Patent Office on January 15, 1910; and it therefore denies the allegation of the bill of complaint in these respects and leaves complainants to their proofs thereof; and it further denies that thereby or otherwise complainants became or are the sole and exclusive owners of the entire right, title and interest in and to said alleged inventions or improvements and in and to said Letters Patent, and are exclusively entitled to bring this suit against the defendant named in said bill of complaint.

X.

It denies that said alleged inventions or improvements in illuminating apparatus for scales shown and described and claimed in said Letters Patent No. 937,573 have been or are of great or of any benefit or advantage to complainants, denies that complainants have or either of them has invested or expended large or any sums of money, and that said complainants have or either of them has been to great or any trouble or expense in and about said alleged inventions or improvements in illuminating apparatus for scales for the purpose of introducing them into public use or making them profitable and useful to the public, denies that said alleged improvements or inventions have been or are of great or any utility or value or of great or any benefit to the public, denies that they have become widely or favorably known throughout the United States of America or any part thereof or foreign countries or that a great or any demand for such scales has been created within the United States, denies that the public generally or any portion of it has acknowledged or acquiesced in the validity of said Letters Patent No. 937,573 or in the alleged exclusive right secured to complainants thereby, and denies that the complainants would realize or receive advantage or any gains and profits from said alleged improvements or inventions if the defendant herein were enjoined from continuing its said alleged infringements of said Letters Patent.

XI.

It denies that at any time between the dates of the grant of said Letters Patent and the filing of the bill of complaint herein, or at any time between the date when it is alleged that complainants acquired the entire right, title and interest to said Letters Patent No. 937,573 and the filing of the bill of complaint herein, it, defendant herein, knowing alleged facts or any of them set forth in the bill of complaint herein, or contriving in any manner to injure complainants or deprive them of any benefits or advantage which might and otherwise would accrue to them from said letters patent and the alleged improvements or inventions in Illuminating Apparatus for Scales therein shown, described and claimed, or otherwise, had been or at the time of the filing of the bill of complaint herein was engaged in manufacturing, selling or using, or

causing others to use, illuminating apparatus for scales embodying the alleged improvements or inventions shown, described and claimed in said Letters Patent or constructed in the manner set forth and particularly claimed therein, in the City of New York, Borough of Manhattan, State of New York, or within the Southern Judicial District thereof or elsewhere within the United States; denies that it, the defendant, has at any time or place manufactured, sold or used or caused others to use, or intended or threatened to manufacture, sell or use or cause others to use any illuminating apparatus for scales or any apparatus whatever embodying the alleged improvements and inventions shown, described and claimed in said Letters Patent No. 937,573, or any part thereof, or in any manner whatsoever infringed said letters patent or violated any rights of the complainants thereunder; and denies that complainants have been or are being deprived of any gains or profits which might and otherwise would have been obtained by them but which have been or are now being received or enjoyed by defendant by and through any unlawful acts or doings of defendant.

XII.

It denies that the complainants have given notice to the public by causing the scales manufactured, sold and used by them under and in accordance with the aforesaid Letters Patent No. 937,573 to be marked with the day and year of said Letters Patent in accordance with Section 4900 of the Revised Statutes of the United States of America in such cases made and provided, or by affixing thereto the word "Patented" together with the day and year on which the letters patent were issued and granted; denies that complainants have given particular notice to defendant of its alleged infringement of said Letters Patent of the United States No. 937,573 or requested defendant to desist therefrom; denies that defendant did continue and still continues after any such alleged notice or request, to make, sell or use scales in violation and infringement of said Letters Patent, or that it still persists in any unlawful act in infringement of said letters patent; denies that it still continues to make, sell or use scales containing or embodying the alleged inventions or improvements embodied or contained in Letters Patent No. 937,573; and denies that any of its acts alleged in the bill of complaint herein or that its alleged disregard and violations

of any rights of the complainants have had or do have the effect to or do in fact encourage others to disregard any rights of complainants under said letters patent, and deny that it has committed any unlawful acts or has disregarded or violated any rights of complainants thereunder.

XIII.

It avers, on information and belief, that in view of the prior state of the art at the date of the alleged invention thereof by the said Harry H. Bane and Samuel G. Crane, and in view of the common knowledge and practice in the United States in the art of illuminating apparatus for scales and analogous arts; and in view of the letters patent and other printed publications illustrating and describing said arts prior to the date of the said alleged invention of said Bane and Crane, the alleged inventions and improvements described and claimed in the aforesaid Letters Patent No. 937,573, did not constitute a patentable invention and that said Letters Patent are therefore void.

XIV.

It avers, on information and belief, that for more than two years prior to the application of said Bane and Crane for said Letters Patent No. 937,573, the alleged invention and improvements described and claimed therein were publicly used and offered for sale and sold by said Bane and Crane, and by others with their knowledge and consent, at Kansas City, Missouri, and elsewhere within the United States, and were abandoned to the public.

XV.

It avers, on information and belief, that more than two years prior to the application of said Bane and Crane for said Letters Patent No. 973,573, the alleged inventions and improvements described and claimed therein had been patented and described in various printed publications both in this country and abroad, among such prior patents and printed publications being the following:

U. S. Patent No. 690,855, issued and published Jan. 7, 1902, to William Greene and Stein Chisholm.

U. S. Patent No. 446,208, issued and published Feb. 10, 1891, to Adolph B. Rover.

U. S. Patent No. 635,852, issued and published Oct. 31, 1899, to George B. Heath.
U. S. Patent No. 638,893, issued and published Dec. 12, 1899, to Charles E. Vernon and Arthur Ross.
U. S. Patent No. 637,904, issued and published Nov. 28, 1899, to Alfred J. Swaab and Rodolphe de Lamprecht.
U. S. Patent No. 374,013, issued and published Nov. 29, 1887, to James E. Tarbox.
U. S. Patent No. 256,423, issued and published April 11, 1882, to Walton W. Wright.
U S. Patent No. 502,433, issued and published August 1, 1893, to John W. Gibboney.
U. S. Patent No. 414,000, issued and published Oct. 29, 1889, to Edward H. Amet.
U. S. Patent No. 423,654, issued and published March 18, 1890, to Edward H. Amet.
U. S. Patent No. 628,894, issued and published July 11, 1899, to John Outcalt and David de Pyster A. Outcalt.
U. S. Patent No 764,277, issued and published July 5, 1904, to Fred G. Dieterich.
U. S. Patent No. 748,055, issued and published Dec. 29, 1903, to George H. Driver and James P. K. Clark.
U. S. Patent No. 774,964, issued and published Nov. 15, 1904, to Hans Dahl.
U. S. Patent No. 785,209, issued and published March 21, 1905, to Guy Hamilton.
U. S. Patent No. 361,275, issued and published April 19, 1887, to Edwin S. Enyart.

XVI.

It avers on information and belief that prior to the alleged invention by said Bane and Crane of the alleged improvements described and claimed in said Letters Patent No. 937,573, the said alleged invention and improvements and every material and substantial part thereof had been patented and described in various letters patent and printed publications, among others in Letters Patent of the United States as follows:
No. 690,855, issued and published Jan. 7, 1902, to William Greene and Stein Chisholm;
No. 446,208, issued and published Feb. 10, 1891, to Adolph B. Rover;
No. 635,852, issued and published Oct. 31, 1899, to George B. Heath;

No. 638,893, issued and published Dec. 12, 1899, to Charles E. Vernon and Arthur Ross;
No. 637,904, issued and published Nov. 28, 1899, to Alfred J. Swaab and Rodolphe de Lamprecht;
No. 374,013, issued and published Nov. 29, 1887, to James E. Tarbox;
No. 256,423, issued and published April 11, 1882, to Walton W. Wright;
No. 502,433, issued and published August 1, 1893, to John W. Gibboney;
No 414,000, issued and published Oct. 29, 1889, to Edward H. Amet;
No. 423,654, issued and published March 18, 1890, to Edward H. Amet;
No. 628,894, issued and published July 11, 1899, to John Outcalt and David de Pyster A. Outcalt;
No. 764,277, issued and published July 5, 1904, to Fred G. Dieterich;
No. 748,055, issued and published Dec. 29, 1903, to George H. Driver and James P. K. Clark;
No. 833,447, issued and published Oct. 16, 1906, to Stephen J. Derbes;
No. 859,224, issued and published July 9, 1907, to Robert G. Howard;
No. 886,775, issued and published May 5, 1908, to John J. Duffie.
No. 774,964, issued and published Nov. 15, 1904, to Hans Dahl.
No. 785,209, issued and published March 21, 1905, to Guy Hamilton.
No. 361,275, issued and published April 19, 1887, to Edwin S. Enyart.

XVII.

It avers, on information and belief, that prior to the alleged invention by said Bane and Crane of the alleged improvements described and claimed in the aforesaid Letters Patent No. 937,573, and for more than two years prior to their application for said Letters Patent, said alleged invention and improvements described and claimed therein and every material and substantial part thereof were known to and used by and were publicly used and offered for sale and sold by various persons at various places within the United States, among others:

John W. Gibboney, at Lynn, Massachusetts, where he then

resided and, as defendant is informed and believes, now resides.

Walton W. Wright, at Cairo, Illinois, where he then resided and, as defendant is informed and believes, now resides.

James E. Tarbox, at Lynn, Massachusetts, where he then resided and, as defendant is informed and believes, now resides.

Adolph B. Rover, at Binghampton, New York, where he then resided and, as defendant is informed and believes, still resides;

William Greene and Stein Chisholm, at San Francisco, California, where they then resided and, as defendant is informed and believes, now reside;

Edward H. Amet, at Chicago, Illinois, where he then resided and, as defendant is informed and believes, still resides;

John J. Duffie, at San Francisco, California, where he then resided and, as defendant is informed and believes, still resides;

Robert G. Howard, at Newton, Massachusetts, where he then resided and, as defendant is informed and believes, still resides;

Stephen J. Derbes, at New Orleans, Louisiana, where he then resided and, as defendant is informed and believes, still resides;

John Outcalt and David de Pyster A. Outcalt, at Spottswood, New Jersey, where they then resided and, as defendant is informed and believes, still reside;

Fred G. Dieterich, at Washington, D. C., where he then resided and, as defendant is informed and believes, still resides;

Edwin S. Enyart, at Ottawa, Illinois, where he then resided and, as defendant is informed and believes, still resides;

Guy Hamilton, at Detroit, Michigan, where he then resided and, as defendant is informed and believes, still resides.

XVIII.

It avers, on information and belief, that said Bane and Crane were not the original or first inventors of the subject matter of said Letters Patent, but prior to their alleged invention thereof the subject matter had been invented by:

John J. Duffie, of San Francisco, California, who was using due diligence in perfecting and adapting the same and reducing it to practice;

Robert G. Howard, of Newton, Massachusetts, who was

using due diligence in perfecting and adapting the same and reducing it to practice;

Stephen J. Derbes, of New Orleans, Louisiana, who was using due diligence in perfecting and adapting the same and reducing it to practice.

Charles B. Longstreth, of Dayton, Ohio, who was using due diligence in perfecting and adapting the same and reducing it to practice.

B. K. Hoppock, of Somerville, New Jersey, who was using due diligence in perfecting and adapting the same and reducing it to practice.

XIX.

It avers that acts of said Bane and Crane in the proceedings had in the United States Patent Office for procuring the said letters patent No. 937,573, estop them and their assignees from maintaining the same in such scope as to cover or embrace any illuminating apparatus for scales or any apparatus that defendant may have made, used or sold or caused others to use, at any time.

XX.

It avers that said Bane and Crane, as applicants for the aforesaid letters patent No. 937,573, did not make oath as required by the laws of Congress and the Revised Statute of the United States, and particularly Section 4892 thereof, concerning all that is set forth in said letters patent and particularly claimed therein, and that said letters patent are therefore invalid.

XXI.

It avers, on information and belief, that said Henry H. Bane and Samuel G. Crane were not in any sense joint inventors of the subject matter of said Letters Patent No. 937,573, and that said Letters Patent are therefore invalid.

XXII.

It avers, on information and belief, that for the purpose of deceiving the public the description and specification filed by said Bane and Crane in the United States Patent Office was made to contain less than the whole truth relative to their al-

leged invention or discovery, or more than is necessary to produce the desired effect.

All of which matters and things this defendant is ready to aver, maintain and prove as this Honorable Court shall direct, and prays to be hence dismissed with its costs in this behalf most wrongfully sustained.

TOLEDO COMPUTING SCALE CO.
By RECTOR, HIBBEN, DAVIS & MACAULEY,
Solicitors and of Counsel.

CLARENCE D. KERR
Solicitor and of Counsel.
FRANK PARKER DAVIS,
Of Counsel.

Endorsed: U. S. Circuit Court Southern District N. Y. Filed Nov. 6—1911 John A. Shields Clerk.

CIRCUIT COURT OF THE UNITED STATES,

Southern District of New York.

The Computing Scale Company and Jonathan B. Hayward, *Complainants,*	In Equity.
vs.	No. 8—93.
Toledo Computing Scale Company, *Defendant.*	

The replication of the above-named complainants to the answer of the above named defendant.

These repliants, saving and reserving to themselves all and all manner of advantage of exception which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of said defendant, for replication thereunto saith that they do and will aver, maintain and prove their said bill to be true, certain and sufficient in the law to be answered unto by said defendant, and that the answer of said defendant is very uncertain, evasive and insufficient in the law to be replied unto by these repliants; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, confessed or avoided, traversed or denied, is true; all which matters and things these repliants are ready to aver, maintain and prove

as this Honorable Court shall direct, and humbly pray as in and by their said bill they have already prayed.

KERR, PAGE, COOPER & HAYWARD,
Solicitors for Complainants.

Dated, New York, N. Y.,
November 25th, 1911.

Endorsed: U. S. Circuit Court Southern District N. Y. Filed Nov 25—1911 John A Shields Clerk

UNITED STATES DISTRICT COURT

Southern District of New York.

The Computing Scale Company and Jonathan B. Hayward, *Complainants,* —*vs*— Toledo Computing Scale Company, *Defendant.*	In Equity No. 8—93.

AMENDMENT TO ANSWER.

Now comes the defendant herein and amends its answer in the following particulars:

(1) At the end of paragraph XV by inserting the following:

United States patent No. 408,992, issued and published August 13, 1889, to John M. Schmidt.

United States Patent No. 509,658, issued and published November 28, 1893 to the National Cash Register Company, assignee of Edmund D. Gibbs.

United States reissued patent No. 12,335, reissued and published April 4, 1905 to Bond Scale Company, assignee of Charles L. Bond.

British patent No. 19,925 of 1891 to William V. Hunt and Frederick Brown.

(2) By inserting at the end of Paragraph XVI the following

No. 408,992, issued and published August 13, 1889, to John M. Schmidt.

No. 509,658, issued and published November 28, 1893, to The National Cash Register Company, Assignee of Edmund D. Gibbs.

No. 12,335, reissued and published April 4, 1905, to Bond Scale Company, assignee of Charles L. Bond.
No. 881,020, issued and published March 3, 1908 to Clarence W. McKee.
No. 863,985, issued and published August 20, 1907 to John Haller and George Neal
And in Letters Patent of Great Britain No. 19,925 of 1891 to William V. Hunt and Frederick Brown.

(3) By inserting after paragraph XXII the following paragraph:

XXIII.

It avers, on information and belief, that said Bane and Crane were not the original or first inventors of the subject matter of said letters patent, but prior to their alleged invention thereof said subject matter had been invented and perfected by;

John J. Duffie of San Francisco, California; Stephen Derbes of New Orleans, Louisiana; Charles W. McKee of Phoenix, Arizona Territory; and John Haller of Chillicothe, Ohio.

CLARENCE D. KERR
RECTOR, HIBBEN, DAVIS & MACAULEY
Solicitors for Defendant.

Complainants agree that the above amendment may be entered nunc pro tunc.

SHERIDAN, WILKINSON, SCOTT & RICHMOND
Solicitors for Complainant.

Chicago, Jany. 24, 1913.
It is so ordered.

.....
U. S. Judge.

Endorsed: U. S. District Court Filed Feb 5—1913 S D of N Y

UNITED STATES DISTRICT COURT

Southern District of New York.

The Computing Scale Company and Jonathan B. Hayward, *Complainants,*
against
Toledo Computing Scale Company, *Defendant.*

Thomas F. Sheridan, for Complainants.

Frank Parker Davis, for Defendant.

Hand, D. J.: I think that the plaintiff is perfectly right in insisting that Bane & Crane first made a scale in which at the critical point of weighing, the circuit was closed and the beam was free from the disturbing weight of the contact-beam, while at the normal position it had engaged the contact-beam and broken the circuit. In saying this I accept the defendant's position that all manifestations of the contact when made, whether in ringing a bell, lighting a light, or cutting off a supply, are equivalents one for the other. As I consider this important, I shall go over the references. In Enyart, 361,275, the circuit is broken at the critical point; in Tarbox the beam is never free of the contact-arm. In Bond, reissue No. 12,335, which is precisely the same thing as Derbes, 833,447, whil the beam is free at the critical point, so it is at the normal point, and to put out the light (if there were one) you must overset the graduated weighing arm. In McKee, No. 881,020, the circuit is broken at the critical point; in Hunt, British, 1891, 19,925, it is closed at the normal position. However, it is not in the least necessary to multiply instances, because on a priori principles the conclusion necessarily follows. In a beam scale the critical point of weighing is when the beam is horizontal and that is the normal position as well. It therefore follows necessarily that when an electrical circuit depends upon contacts which themselves are opened and closed by the movement of the beam of such a scale, the circuit must be closed or open when the beam is horizontal, but it cannot be one or the other alternately. Since in such a scale the critical point only means that the platform has the same weight in it, as the yard, (al-

lowance of course being made for leverage), and as the normal position is only another instance of a critical position, (the platform and the yard with its poise being severally precisely equivalent mechanically to weights in each), it was an impossible problem to make out of such contacts a mechanism which would at once shine on the beam when it was at the critical point and go out at the normal point. With this conclusion in mind, I agree with Carter that the patentees did not understand their own patent when they said that it could be used on a beam scale. If we suppose it so changed, we must at least allow the disturbing effect of the contact-beam, 18, with its oversetting weight, 20, at the critical moment of the scale and we must also concede that the light would go out at that instant.

The nearest approximation would be Bond, Derbes, or Hunt, in each of which the light would be on at the critical point, (the "flashing" could be controlled with a little care of the beam), but in which it would not go out when the scale was out of use, unless overset voluntarily. McKee, fig. 2, could by an obvious change be made to act in the same way, i. e., by having the spring, 12, make an electrical contact when released to its extended position by the plunger, 3, which would have to be taken out of the circuit itself.

The reason why it was possible for Bane & Crane to solve this problem was because they took a scale the position of whose beam was different in normal from what it was at the critical point. Thus they secured the possibility of the automatic extinction of the light when the normal position was reached and at that time only. That there was any mechanical difficulty in working out this problem with the prior art before one, once you had conceived the idea of putting a light upon such a scale, does not admit, in my judgment, of any question whatever. If, for instance, one takes Bond, Derbes or Hunt and conceives a scale in which the critical point differs in position from the normal, the defendant's structure is there without the slightest modification. Now such a scale was at hand and well known at the time; it was the computing scale which weighed by the leverage of the beam. This scale Bane & Crane did not select as an invention, they started with it, and the mechanism was already exactly shown in the three patents just named applicable to the purpose. In the computing scale just the solution was found which could not be in the beam scales.

I must, therefore, hold that the invention here consisted

only of the mere conception of lighting a computing scale automatically when in use, and then only. Once you had that idea, you had only to look to the nearest possible art, i. e., that of electrical contacts upon scales, and the whole mechanism was at hand, at least any mechanism which the defendant has ever used.

Should it, therefore, be held to be invention to see that it would be a good thing to illumine the chart of such a scale with an automatic light? Cash registers were not very remote, and automatic lights had been put on them, Gibbs, 509,658. But surely no invention was necessary to discover the need of a light when the scale was set in a dark place and once you thought of a light, it hardly required invention to consider that it would be well to have it automatic. If, therefore, I am right in supposing that the scale art had already completely developed the necessary mechanism of electrical contacts which, when applied to a computing scale, would fill the need so conceived, I confess that I cannot quite see what room is left for invention.

I think some corroboration is indirectly thrown upon this aspect of the case by Crane's own testimony. He was putting lights on typewriters, alarm-clocks, scales, "in fact everything I came in contact with," (Q. 98, 144). He was considered, he says, "an illuminating engineer," (Q. 44). Now there is certainly no touch of genius in the obsession of illuminating automatically everything one comes in contact with, including scales. It may have taken invention to do what Crane did with the knowledge he had, but we have no right to judge him by that; he can succeed only upon the assumption that he had before him Bond, Derbes and Hunt, and with his purpose once grasped, he had only to apply either one of these exactly as it stood, without the slightest modification, and he would have got the defendant's device. While Crane's testimony may perhaps be colored, I cannot think that there could have been any bias in the statements I have mentioned.

Two objections at once occur; first, that the patent passed the office, second, that it has been in practise used. As to the first, it is much weakened by a consideration of the file-wrapper, from which it appears that the examiner only found Enyart and Tarbox, in both of which the contacts were broken at the critical point, unlike Bond, Derbes and Hunt. One may have one's own judgment, perhaps, as to

the amount of invention necessary to adapt Tarbox to the defendant's structure, but, be that as it may, the fact remains that it could not be taken bodily out of the disclosure and put without change upon a computing scale, which could literally be done with the other three. We cannot of course suppose that the examiner cited the weaker references, knowing the stronger, and I cannot, therefore, feel that there is any presumption which should arise from his action, had he held that there was patentable novelty over the three patents cited.

The final consideration is that arising from use. Duffie, 886,775, is some indication that there was no need for singular inventive genius, even if Bane & Crane preceded him by a few months, as I am now assuming. Nor has the subsequent acceptance of the invention been such as courts sometimes consider in doubtful cases. The plaintiff equips 20% of its machines with this apparatus, surely no very impressive proportion in so expensive a machine. It appears that there was an increase in the general business of 10% since they were introduced. The drum scale is displacing the fan scale, but owes apparently none of its popularity to the lighting, which is a convenience, but chiefly a good advertisement. Perhaps the subject-matter does not admit of much better proof, but the fact remains that there is absolutely no reason to assume that there was any long-felt want which this supplied. On the contrary, the plaintiff's very limited equipping of its machines shows that there was no such want, but that on the contrary, probably it is only an incident or extra put on to satisfy the individual taste or fancy of the customer. It was a useful ingenuity, but there is absolutely nothing to suggest that it was beyond the scope of the mechanical abilities of thousands of active, fertile minds which are constantly at work in this art putting it forward by gradual accretion.

Bill dismissed with costs.

L. H.
D. J.

December 26, 1913.

Endorsed: U. S. District Court. Filed Dec 26-1913 S D of N. Y.

IN THE UNITED STATES DISTRICT COURT

Southern District of New York.

The Computing Scale Company and Jonathan B. Hayward, *Plaintiffs,* vs. Toledo Computing Scale Company, *Defendant.* } In Equity, No. 8-93.

FINAL DECREE.

This cause came on to be heard at the December Term, 1913, and was argued by counsel, and thereupon, upon consideration thereof, it was Ordered, Adjudged and. Decreed as follows, viz., that the Bill be, and the same is hereby, dismissed, with costs to the defendant to be taxed and that defendant have execution therefor.

LEARNED HAND
Judge.

Dated, July 13, 1914.
Approved as to form:
KERR, PAGE, COOPER & HAYWARD
Solicitors for Plaintiffs.
CLARENCE D. KERR
Solicitors for Defendant.

Endorsed: U. S. District Court. Filed July 14-1914 S D of N. Y.

UNITED STATES DISTRICT COURT,

Southern District of New York.

The Computing Scale Company and Jonathan B. Hayward, *Plaintiffs,* vs. Toledo Computing Scale Company, *Defendant.* } In Equity No. 8-93. On Patent No. 937,573.

DECREE ON MANDATE.

A decree having been entered in the District Court of the United States, Southern District of New York, on the 13th

day of July, 1914, in the above entitled cause, dismissing the bill of complaint therein with costs to the defendant, and the transcript of record of said Court having been taken into the United States Circuit Court of Appeals for the Second Circuit, by virtue of an appeal, and the said Circuit Court of Appeals having, on consideration thereof, ordered, adjudged and decreed that the said decree of the District Court be affirmed with costs in the Circuit Court of Appeals, taxed in the sum of $25., and having issued the mandate to this Court, dated May 26, 1915.

Now on motion of Clarence D. Kerr, Solicitor for the defendant, it is

Ordered, Adjudged, and Decreed that the said mandate be and the same hereby is made the order and decree of the Court, and it is further

Ordered, Adjudged, and Decreed that the defendant recover of the plaintiff the sum of $194.81, taxed as costs in this Court, together with the sum of $25., taxed as costs in the United States Circuit Court of Appeals, and that defendant have execution therefor.

Dated Oct. 25, 1915.

AUGUST N. HAND
U. S. Judge.

Approved as to form:
KERR, PAGE, COOPER & HAYWARD
Solicitors for Plaintiffs.

Endorsed: Filed U. S. District Court. Oct 25-1915 S D of N. Y.

All of which we have caused by these presents to be exemplified, and the Seal of the said District Court to be hereunto affixed.

Witness, the Honorable Augustus N. Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, in the Southern District of New York, this 29th day of May in the year of our Lord one thousand nine hundred seventeen and of our Independence the one hundred and forty-first.

(Seal)

ALEX. GILCHRIST JR.
Clerk.

United States of America,
Southern District of New York, } ss.:

I, Augustus N. Hand, one of the Judges of the District Court of the United States for the Southern District of New York, do hereby certify, that Alexander Gilchrist, Jr., whose name is subscribed to the preceding exemplification, is the Clerk of the said District Court, duly appointed and sworn, and that full faith and credit are due to his official acts. I further certify that the Seal affixed to the said exemplification is the Seal of the said District Court, and that the attestation thereof is in due form of law.
Dated New York, May 29th, 1917.

AUGUSTUS N. HAND
United States District Judge.

United States of America,
Southern District of New York, } ss.:

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States for the Southern District of New York, do hereby certify, that Hon. Augustus N. Hand, whose name is subscribed to the preceding Certificate, is one of the Judges of the District Court of the United States for the Southern District of New York, duly appointed and sworn, and that the signature of said Judge to said Certificate is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the Seal of the said Court, at the City of New York, in the Southern District of New York, this 29th day of May 1917.

ALEX. GILCHRIST JR.
Clerk.

(Seal)

Plaintiff's Exhibit No. 77. 1993

For Iden:
PLTF. EX. 77.
Admitted C. B. M., Master

TOLEDO COMPUTING SCALE COMPANY

COMPARATIVE STATEMENT OF PROFITS ON MANUFACTURE AND SALE OF CYLINDER SCALES—BEFORE CHARGING INTEREST

COMPARATIVE STATEMENT OF PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES—STATED UPON A PERCENTAGE BASIS ON NET SALES

COMPARATIVE STATEMENT OF PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES—STATED UPON A "PER SCALE" BASIS

From January 1, 1906, to August 31, 1912

Marwick, Mitchell, Peat & Co.
Chartered Accountants

TOLEDO COMPUTING SCALE COMPANY

STATEMENT OF PROFITS ON MANUFACTURE AND SALE OF CYLINDER SCALES—BEFORE CHARGING INTEREST—FROM JANUARY 1, 1906, TO AUGUST 31, 1912, AS PER PRICE, WATERHOUSE AND COMPANY AND MARWICK, MITCHELL, PEAT AND CO'S. STATEMENTS

	P.W.& Co.	M.M.P.& Co.
United States:		
Year ended December 31, 1906	$ 678.99	563.57
Year ended December 31, 1907	16,866 05	24,198.68
Year ended December 31, 1908	37,196.20	59,422.28
Year ended December 31, 1909	75,638.47	101,263.65
Year ended December 31, 1910	61,799.76	107,301.27
Year ended December 31, 1911	11,191.19	108,749.77
Eight Months ended August 31, 1912	31,108.98	70,261.64
Total Profits before charging Interest	$234,479.64	471,760.86

Notes:

(1) The statement of Marwick, Mitchell, Peat and Co. is prepared on the basis adopted by Price, Waterhouse and Company. They—Price, Waterhouse and Company—created a separate account for second hand business and included therein Repairs, Freight Inward, etc.; and charged Insurance and Taxes as a manufacturing cost instead of as a commercial and selling overhead expense as recorded in accounts prepared by Toledo Computing Scale Company.

(2) No amount is included in the above statement for 1,839 Cylinder Scales on hand at September 3, 1912—as testified to by witness William Zolg—Defendant's Exhibit Page 18.

(3) No note is taken of Scales or Parts in course of manufacture at August 31 or September 3, 1912.

(4) The Canadian business has not been included in this Statement.

(5) The value of the business developed during this period has not been considered in this Statement.

Plaintiff's Exhibit No. 77. 1995

TOLEDO COMPUTING SCALE COMPANY

COMPARATIVE STATEMENT OF PROFIT OR LOSS ON MANUFACTURE AND SALE OF CYLINDER SCALES IN UNITED STATES—FROM JANUARY 1, 1906, TO AUGUST 31, 1912—AS PER STATEMENTS OF PRICE, WATERHOUSE AND COMPANY AND MARWICK, MITCHELL, PEAT AND CO.

	Year 1906		Year 1907	
	P.W.&Co.	M.M.P.&Co.	P.W.&Co.	M.M.P.&Co.
Sales	$5,760.00	5,760.00	154,758.00	154,758.00
Deduct Charge Backs	216.00	216.00	6,922.00	6,922.00
Net Sales	5,544.00	5,544.00	147,836.00	147,836.00
Cost of Sales	939.13	1,246.63	28,948.47	25,012.79
Commission to Agents	1,738.66	1,759.29	50,378.28	50,554.29
Commercial and Selling Overhead	1,529.61	1,590.24	36,156.30	37,147.05
Losses on Agents' and Customers' Accounts	172.80	166.32	4,642.74	4,435.08
Depreciation on Buildings	.....	.....	.....	303.13
Allowances Exchange Scales	478.13		11,071.15	
Profit or Loss Second Hand Department	6.68	217.95	*238.41*	6,184.98
Losses on Agents' and Customers' Accounts (Second Hand Department)	.....		11.42	
	484.81		10,844.16	
Total Cost and Expenses	4,865.01	4,980.43	130,969.95	123,637.32
Profit before charging Interest	$ 678.99	563.57	16,866.05	24,198.68

TOLEDO COMPUTING SCALE COMPANY

COMPARATIVE STATEMENT OF PROFIT OR LOSS ON MANUFACTURE AND SALE OF CYLINDER SCALES IN UNITED STATES—FROM JANUARY 1, 1906, TO AUGUST 31, 1912—AS PER STATEMENTS OF PRICE, WATERHOUSE AND COMPANY AND MARWICK, MITCHELL, PEAT AND CO.

Year 1908		Year 1909		Year 1910		Year 1911		Eight Months 1912	
P.W.& Co.	M.M.P.& Co.	P.W.& Co.	M.M.P.& Co.	P.W.& Co.	M.M.P.& Co.	P.W.& Co.	M.M.P.& Co.	P.W.& Co.	M.M.P.& Co.
459,372.50	459,372.50	605,466.41	605,466.41	789,358.11	789,358.11	.....	803,657.26	516,216.61	516,216.61
22,295.75	22,295.75	49,358.33	49,358.33	66,732.35	66,732.35	.....	77,985.87	47,184.90	47,184.90
437,076.75	437,076.75	556,108.08	556,108.08	722,625.76	722,625.76	711,178.84	725,671.39	469,031.71	469,031.71
76,962.18	64,861.66	92,109.63	80,125.86	154,138.10	122,951.39	.....	126,896.23	93,545.46	77,956.21
164,179.36	167,774.10	194,152.13	196,605.34	224,356.54	226,756.35	.....	175,265.75	129,919.97	114,862.86
91,212.08	92,549.69	131,184.93	129,176.12	198,927.56	198,761.11	.....	222,493.75	142,774.63	141,518.12
13,781.18	13,112.30	18,163.99	16,683.24	23,680.74	21,678.77	.....	21,770.14	15,486.50	17,552.66
.....	303.13	.....	303.13	.....	303.13	.....	303.13	.....	348.34
58,828.67		57,757.21		78,614.89		.....	.....	70,177.13	
5,545.33	39,053.59	*15,916.08*	31,950.74	*21,055.16*	44,873.74	.....	70,192.62	*16,201.16*	46,531.88
462.41		1,017.80		2,163.33		.....	.....	2,220.20	
53,745.75		44,858.93		59,723.06				56,196.17	
399,880.55	377,654.47	480,469.61	454,844.43	660,826.00	615,324.49	699,987.65	616,921.62	437,922.73	398,770.07
37,196.20	59,422.28	75,638.47	101,263.65	61,799.76	107,301.27	11,191.19	108,749.77	31,108.98	70,261.64

COMPARATIVE STATEMENT OF PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES—STATED UPON A PERCENTAGE BASIS ON NET SALES—BASED ON STATEMENTS OF PRICE, WATERHOUSE AND COMPANY AND MARWICK, MITCHELL, PEAT AND CO.

		Year 1906		Year 1907		Year 1908		Year 1909		Year 1910		Year 1911		8 Months 1912	
		P.W. & Co.	M.M.P. & Co.	P.W. & Co.	M.M.P. & Co.	P.W. & Co.	M.M.P. & Co.	P.W. & Co.	M.M.P. & Co.	P.W. & Co.	M.M.P. & Co.	P.W. & Co.	M.M.P. & Co.	P.W. & Co.	M.M.P. & Co.
Sales	%	103.90	103.90	104.68	104.68	105.10	105.10	108.88	108.88	109.23	109.23	.....	110.75	110.06	110.06
Deduct Charge Backs		3.90	3.90	4.68	4.68	5.10	5.10	8.88	8.88	9.23	9.23	.....	10.75	10.06	10.06
		100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00
Cost of Sales		16.94	22.49	19.58	16.92	17.61	14.84	16.56	14.41	21.33	17.01	.....	17.49	19.94	16.62
Commission to Agents		31.36	31.73	34.07	34.20	37.56	38.38	34.91	35.35	31.04	31.38	.....	24.15	27.70	24.49
Commercial and Selling Overhead		27.59	28.68	24.45	25.13	20.87	21.17	23.59	23.23	27.53	27.51	.....	30.66	30.44	30.17
Losses on Agents' and Customers' Accounts		3.12	3.00	3.14	3.00	3.15	3.00	3.27	3.00	3.28	3.00	.....	3.00	3.30	3.74
Depreciation on Buildings		.....	.....	.....	.20	.....	.07	.....	.05	.....	.04	.....	.04	.....	.08
Allowances Exchange Scales		8.62		7.50		13.46		10.39		10.88		.....		14.96	
Profit or Loss Second Hand Department		.12	3.93	*.16*	4.18	*1.27*	8.94	*2.50*	5.75	*2.91*	6.21	.....	9.67	*3.45*	9.92
Losses on Agents' and Customers' Accounts (Second Hand Department)		.....		.01		.11		.18		.30		.....		.48	
		8.74		7.35		12.30		8.07		8.27				11.99	
Total Cost and Expenses		87.75	89.83	88.59	83.63	91.49	86.40	86.40	81.79	91.45	85.15	98.43	85.01	93.37	85.02
Profit before charging Interest	%	12.25	10.17	11.41	16.37	8.51	13.60	13.60	18.21	8.55	14.85	1.57	14.99	6.63	14.98

COMPARATIVE STATEMENT OF PROFIT ON MANUFACTURE AND SALE OF CYLINDER SCALES—STATED UPON A "PER SCALE" BASIS—BASED ON STATEMENTS OF PRICE, WATERHOUSE AND COMPANY AND MARWICK, MITCHELL, PEAT AND CO.

	Year 1906		Year 1907		Year 1908		Year 1909		Year 1910		Year 1911		8 Months 1912	
	P.W. & Co.	M.M.P. & Co.	P.W. & Co.	M.M.P. & Co.	P.W. & Co.	M.M.P. & Co.	P.W. & Co.	M.M.P. & Co.	P.W. & Co.	M.M.P. & Co.	P.W. & Co.	M.M.P. & Co.	P.W. & Co.	M.M.P. & Co.
Number of Scales Sold—Net	55	55	1,159	1,159	3,052	3,052	3,929	3,929	5,060	5,060	4,671	4,675	2,894	2,894
Sales—Net	$100.80	100.80	127.55	127.55	143.21	143.21	141.54	141.54	142.81	142.81	152.25	155.22	162.07	162.07
Cost of Sales	17.08	22.67	24.98	21.58	25.22	21.25	23.44	20.39	30.46	24.30	.....	27.14	32.32	26.94
Commission to Agents	31.61	31.99	43.47	43.62	53.79	54.97	49.42	50.04	44.34	44.81	.....	37.49	44.89	39.69
Commercial and Selling Overhead	27.81	28.91	31.20	32.05	29.89	30.32	33.39	32.88	39.31	39.28	.....	47.59	49.34	48.90
Losses on Agents' and Customers' Accounts	3.14	3.02	4.00	3.83	4.51	4.30	4.62	4.25	4.68	4.28	.....	4.66	5.35	6.06
Depreciation on Buildings	.....	.....	.....	.26	.....	.10	.....	.08	.....	.06	.....	.06	.....	.12
Allowances Exchange Scales	8.69		9.55		19.28		14.70		15.54		.....		24.25	
Profit or Loss Second Hand Department	.12	3.96	*.21*	5.33	*1.89*	12.80	*5.54*	8.13	*4.16*	8.87	.....	15.02	*5.60*	16.08
Losses on Agents' and Customers' Accounts (Second Hand Department)	.....		.01		.15		.26		.43		.....		.77	
	8.81		9.35		17.61		11.42		11.81				19.42	
Total Cost and Expenses	88.45	90.55	113.00	106.67	131.02	123.74	122.29	115.77	130.60	121.60	149.86	131.96	151.32	137.79
Profit before charging Interest	$ 12.35	10.25	14.55	20.88	12.19	19.47	19.25	25.77	12.21	21.21	2.39	23.26	10.75	24.28

For Iden:
PLTF. EX. 78.
Admitted C. B. M., Master

TOLEDO COMPUTING SCALE COMPANY

COMPARATIVE STATEMENT OF PROFITS OR LOSSES ON MANUFACTURE AND SALE OF FAN SCALES — BEFORE CHARGING INTEREST

COMPARATIVE STATEMENT OF PROFIT OR LOSS ON MANUFACTURE AND SALE OF FAN SCALES—STATED UPON A PERCENTAGE BASIS ON NET SALES

COMPARATIVE STATEMENT OF PROFIT OR LOSS ON MANUFACTURE AND SALE OF FAN SCALES—STATED UPON A "PER SCALE" BASIS

From January 1, 1906, to August 31, 1912

Marwick, Mitchell, Peat & Co.
Chartered Accountants

Plaintiff's Exhibit No. 78. 1999

TOLEDO COMPUTING SCALE COMPANY

STATEMENT OF PROFITS OR LOSSES ON MANUFACTURE AND SALE OF FAN SCALES—BEFORE CHARGING INTEREST—FROM JANUARY 1, 1906, TO AUGUST 31, 1912, AS PER PRICE, WATERHOUSE AND COMPANY AND MARWICK, MITCHELL, PEAT AND CO'S. STATEMENTS

	P.W.& Co.	M.M.P.& Co.
United States:		
Year ended December 31, 1906	$ 32,308.49	33,596.17
Year ended December 31, 1907	17,652.96	8,850.20
Year ended December 31, 1908	15,612.32	24,444.36
Year ended December 31, 1909	56,541.72	33,051.36
Year ended December 31, 1910	11,135.64	*35,106.69*
Year ended December 31, 1911	*12,995.99*	*84,064.42*
Eight Months ended August 31, 1912	8,350.50	*32,220.71*
Total Profits or *Losses* before charging Interest	$128,605.64	*51,449.73*

Notes:

(1) The statement of Marwick, Mitchell, Peat and Co. is prepared on the basis adopted by Price, Waterhouse and Company. They—Price, Waterhouse and Company—created a separate account for second hand business and included therein Repairs, Freight Inward, etc.; and charged Insurance and Taxes as a manufacturing cost instead of as a commercial and selling overhead expense as recorded in accounts prepared by Toledo Computing Scale Company.

(2) No amount is included in the above statement for Scales on hand at September 3, 1912.

(3) No note is taken of Scales or Parts in course of manufacture at August 31 or September 3, 1912.

(4) The Canadian business has not been included in this Statement.

(5) The value of the business developed during this period has not been considered in this Statement.

TOLEDO COMPUTING SCALE COMPANY

COMPARATIVE STATEMENT OF PROFIT OR LOSS ON MANUFACTURE AND SALE OF FAN SCALES IN UNITED STATES—FROM JANUARY 1, 1906, TO AUGUST 31, 1912—AS PER STATEMENTS OF PRICE, WATERHOUSE AND COMPANY AND MARWICK, MITCHELL, PEAT AND CO.

	Year 1906		Year 1907	
	P.W.&Co.	M.M.P.&Co.	P.W.&Co.	M.M.P.&Co.
Sales	$520,925.00	520,925.00	456,924.30	456,924.30
Deduct Charge Backs	38,859.24	38,859.24	36,081.46	36,081.46
Net Sales	482,065.76	482,065.76	420,842.84	420,842.84
Cost of Sales	124,113.65	123,806.15	125,244.35	132,102.39
Commission to Agents	152,995.79	152,975.16	144,099.87	143,912.26
Commercial and Selling Overhead	138,366.13	138,275.50	106,751.78	105,746.02
Losses on Agents' and Customers' Accounts	15,627.75	14,461.97	13,707.73	12,625.29
Depreciation on Buildings	.....	.....	.....	.....
Allowances Exchange Scales	18,076.32		13,666.35	
Profit or Loss Second Hand Department	607.63	18,950.81	*294.29*	17,606.68
Losses on Agents' and Customers' Accounts (Second Hand Department)	.....		14.09	
	18,683.95		13,386.15	
Total Cost and Expenses	449,757.27	448,469.59	403,189.88	411,992.64
Profit or *Loss* before charging Interest	$ 32,308.49	33,596.17	17,652.96	8,850.20

TOLEDO COMPUTING SCALE COMPANY

COMPARATIVE STATEMENT OF PROFIT OR LOSS ON MANUFACTURE AND SALE OF FAN SCALES IN UNITED STATES —FROM JANUARY 1, 1906, TO AUGUST 31, 1912—AS PER STATEMENTS OF PRICE, WATERHOUSE AND COMPANY AND MARWICK, MITCHELL, PEAT AND CO.

Year 1908		Year 1909		Year 1910		Year 1911		Eight Months 1912	
P.W.& Co.	M.M.P.& Co.	P.W.& Co.	M.M.P.& Co.	P.W.& Co.	M.M.P.& Co.	P.W.& Co.	M.M.P.& Co.	P.W.& Co.	M.M.P.& Co.
444,345.81	444,345.81	615,479.33	615,479.33	523,625.78	523,625.78	.....	513,869.71	353,144.09	353,144.09
35,344.67	35,344.67	31,906.66	31,906.66	30,921.25	30,921.25	.....	38,099.44	23,900.08	23,900.08
409,001.14	409,001.14	583,572.67	583,572.67	492,704.53	492,704.53	461,576.62	475,770.27	329,244.01	329,244.01
109,455.39	92,139.87	146,904.13	157,614.58	159,726.47	192,306.46	.....	201,778.15	99,800.31	111,438.34
160,639.19	156,997.13	209,242.87	206,315.10	157,612.33	154,607.22	.....	151,890.13	96,755.98	108,144.48
88,228.42	86,604.76	133,354.40	135,555.76	131,959.88	135,520.35	.....	145,873.07	97,672.20	99,340.82
13,330.37	12,270.04	18,464.38	17,507.18	15,708.77	14,781.14	.....	14,273.11	10,594.32	9,877.32
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
23,791.05 *2,242.60* 187.00	36,544.98	24,546.98 *5,914.38* 432.57	33,528.69	21,800.22 *5,838.68* 599.90	30,596.05	.....	46,020.23	20,068.95 *4,633.17* 634.92	32,663.76
21,735.45		19,065.17		16,561.44				16,070.70	
393,388.82	384,556.78	527,030.95	550,521.31	481,568.89	527,811.22	474,572.61	559,834.69	320,893.51	361,464.72
15,612.32	24,444.36	56,541.72	33,051.36	11,135.64	*55,106.69*	*12,995.99*	*84,064.42*	8,350.50	*32,220.71*

COMPARATIVE STATEMENT OF PROFIT OR LOSS ON MANUFACTURE AND SALE OF FAN SCALES—STATED UPON A PERCENTAGE BASIS ON NET SALES—BASED ON STATEMENTS OF PRICE, WATERHOUSE AND COMPANY AND MARWICK, MITCHELL, PEAT AND CO.

		Year 1906		Year 1907		Year 1908		Year 1909		Year 1910		Year 1911		8 Months 1912	
		P.W. & Co.	M.M.P. & Co.	P.W. & Co.	M.M.P. & Co.	P.W. & Co.	M.M.P. & Co.	P.W. & Co.	M.M.P. & Co.	P.W. & Co.	M.M.P. & Co.	P.W. & Co.	M.M.P. & Co.	P.W. & Co.	M.M.P. & Co.
Sales	%	108.06	108.06	108.57	108.57	108.64	108.64	105.47	105.47	106.28	106.28		108.01	107.26	107.26
Deduct Charge Backs		8.06	8.06	8.57	8.57	8.64	8.64	5.47	5.47	6.28	6.28		8.01	7.26	7.26
		100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00	100.00
Cost of Sales		25.74	25.68	29.76	31.39	26.76	22.53	25.17	27.01	32.42	39.03		42.41	30.31	33.85
Commission to Agents		31.74	31.73	34.24	34.20	39.28	38.39	35.86	35.35	31.99	31.38		31.93	29.39	32.85
Commercial and Selling Overhead		28.70	28.69	25.37	25.13	21.57	21.17	22.85	23.23	26.78	27.51		30.66	29.67	30.17
Losses on Agents' and Customers' Accounts		3.24	3.00	3.26	3.00	3.26	3.00	3.16	3.00	3.19	3.00		3.00	3.22	3.00
Depreciation on Buildings		.....	.....	.....	.....	.....	.....	.....	.....	.....	.....		.....	.....	.....
Allowances Exchange Scales		3.75		3.24		5.8[illegible]		4.21		4.42				6.10	
Profit or Loss Second Hand Department		.13	3.93	.07	4.18	.55	8.93	1.01	5.75	1.18	6.21		9.67	1.41	9.92
Losses on Agents' and Customers' Accounts (Second Hand Department)		.....		.....		.04		.07		.12				.19	
		3.88		3.17		5.31		3.27		3.36				4.88	
Total Cost and Expenses		93.30	93.03	95.80	97.90	96.18	94.02	90.31	94.34	97.74	107.13	102.82	117.67	97.47	109.79
Profit or *Loss* before charging Interest	%	6.70	6.97	4.20	2.10	3.82	5.98	9.69	5.66	2.26	7.13	2.82	17.67	2.53	9.79

COMPARATIVE STATEMENT OF PROFIT OR LOSS ON MANUFACTURE AND SALE OF FAN SCALES—STATED UPON A "PER SCALE" BASIS—BASED ON STATEMENTS OF PRICE, WATERHOUSE AND COMPANY AND MARWICK, MITCHELL, PEAT AND CO.

		Year 1906		Year 1907		Year 1908		Year 1909		Year 1910		Year 1911		8 Months 1912	
		P.W. & Co.	M.M.P. & Co.	P.W. & Co.	M.M.P. & Co.	P.W. & Co.	M.M.P. & Co.	P.W. & Co.	M.M.P. & Co.	P.W. & Co.	M.M.P. & Co.	P.W. & Co.	M.M.P. & Co.	P.W. & Co.	M.M.P. & Co
Number of Scales Sold—Net		5,360	5,360	4,679	4,679	4,581	4,581	7,733	7,733	6,615	6,615	7,702	7,652	4,768	4,768
Sales—Net	$	89.94	89.94	89.94	89.94	89.28	89.28	75.47	75.47	74.48	74.48	59.93	62.17	69.05	69.05
Cost of Sales		23.16	23.10	26.77	28.23	23.89	20.11	19.00	20.38	24.15	29.07		26.37	20.93	23.37
Commission to Agents		28.54	28.54	30.80	30.76	35.07	34.27	27.06	26.68	23.83	23.37		19.85	20.29	22.66
Commercial and Selling Overhead		25.81	25.80	22.81	22.60	19.26	18.90	17.24	17.53	19.95	20.49		19.06	20.49	20.84
Losses on Agents' and Customers' Accounts		2.92	2.70	2.93	2.70	2.91	2.68	2.39	2.26	2.37	2.23		1.87	2.22	2.07
Depreciation on Buildings		.....	.....	.....	.....	.....	.....	.....	.....	.....	.....		.....	.....	.....
Allowances Exchange Scales		3.37		2.92		5.19		3.17		3.29				4.21	
Profit or Loss Second Hand Department		.11	3.53	.06	3.76	.49	7.98	.76	4.34	.88	4.63		6.01	.97	6.85
Losses on Agents' and Customers' Accounts (Second Hand Department)		.....		.....		.04		.06		.06				.13	
		3.48		2.86		4.74		2.47		2.50				3.37	
Total Cost and Expenses		83.91	83.67	86.17	88.05	85.87	83.94	68.16	71.19	72.80	79.79	61.62	73.16	67.30	75.81
Profit or *Loss* before charging Interest	$	6.03	6.27	3.77	1.89	3.41	5.34	7.31	4.28	1.68	5.31	1.69	10.99	1.75	6.76

Plaintiff's Exhibit No. 79. 2003

For Iden:
PLTF. EX. 79.
Admitted C. B. M., Master.

TOLEDO COMPUTING SCALE COMPANY

RECONCILIATION OF PROFITS OF CYLINDER AND FAN BUSINESS ASCERTAINED BY MARWICK, MITCHELL, PEAT & CO. AND BY PRICE, WATERHOUSE & CO.

Marwick, Mitchell, Peat & Co.
Chartered Accountants

TOLEDO COMPUTING SCALE COMPANY

RECONCILIATION OF PROFITS OF CYLINDER AND FAN BUSINESS ASCERTAINED BY MARWICK, MITCHELL, PEAT & CO. AND BY PRICE, WATERHOUSE & CO.

Ascertained by Marwick, Mitchell, Peat & Co.		$ 420,311.13
Ascertained by Price, Waterhouse & Co.		363,085.28
M. M. P. & Co. in excess of P. W. & Co.		57,225.85
Made up thus:		
Losses of Agents' Accounts—years 1906 to 1911—Calculated by P. W. & Co. on Gross Sales and by M. M. P. & Co. on Net Sales, excess allowance by P. W. & Co.	$13,587.05	
Less Excess of M. M. P. & Co. allowance in 1912 by acceptance of Zolg's allowance	1,070.21	
	12,516.84	
Inventory revaluation made by Company effective December 31, 1908, but not credited at that date by Company or by P. W. & Co.	31,690.51	

Note: The entries on the books are:

Scales Inventory	$31,690.51	
Profit and Loss		31,690.51
8-½% increase in valuation of Stock on Hand and on Consignment December 31, 1908.		
Profit and Loss	192,769.45	
Organization		192,769.45
To close the account.		

Copy of memorandum attached to same page:

Mr. Rouse. Dating January 1, 1909:

Credit Profit and Loss Account with $31,690.51, being an addition of 8-½% in the value of scales on hand on consignment.

Wipe out the "Organization" account by charging same to Profit and Loss under same date.

H. Theobald,
Treasurer.

Inventory of Second Hand Scales recorder on books on November 23, 1911—the following being an extract from the entry:

U. S. Exchange Scale Inventory	$20,068.68	
Factory Exchange Scale Inventory	3,816.66	
To Undivided Profits		23,885.34
Entry to place the Competitive Exchange Scales Inventory on our books.		
Carried Forward	$ 44,207.35	57,225.85

Brought Forward		$44,207.35	$57,225.85
Made up thus, Continued:			
Charges by P. W. & Co. to Profit and Loss Account in year 1911, on corresponding credit being given on preparation of Inventory			23,885.34
			68,092.69
Deduct:			
Depreciation charged by M. M. P. & Co. and not by P. W. & Co. for years 1907 to 1912—See Zolg's testimony	$1,863.99		
Depreciation on Machinery, etc., 1907—Charged by M. M. P. & Co. and not by P. W. Co.—See allowances made on Plaintiff's Exhibit "13"	2,457.11		
Depreciation on Machinery, etc., 1908—Charged by M. M. P. & Co. and not by P. W. & Co.—See allowances made on Plaintiff's Exhibit "12"	2,058.47		
Sundry charges by Company in 1910 direct to Profit and Loss and Surplus Account allowed by M. M. P. & Co. and not by P. W. & Co.	3,367.29		
Sundry charges by Company in 1911 direct to Profit and Loss and Surplus Account allowed by M. M. P. & Co. and not by P. W. & Co.	1,119.98	10,866.84	57,225.85

For Iden:
PLTF. EX. 80.
Admitted.
C. B. M., Master.

TOLEDO COMPUTING SCALE COMPANY

STATEMENT OF EXPERIMENTAL, LITIGATION AND PATENT EXPENSES CHARGED IN ACCOUNTS COVERING PERIOD FROM JANUARY 1, 1906, TO AUGUST 31, 1912, SHOWING APPORTIONMENT AS BETWEEN CYLINDER AND FAN BUSINESS PREPARED ACCORDING TO METHOD ADOPTED IN BASIS NUMBER 1.

Marwick, Mitchell, Peat & Co.
Chartered Accountants.

Plaintiff's Exhibit No. 80. 2007

TOLEDO COMPUTING SCALE COMPANY

STATEMENT OF EXPERIMENTAL, LITIGATION AND PATENT EXPENSES CHARGED IN ACCOUNTS COVERING PERIOD FROM JANUARY 1, 1906, TO AUGUST 31, 1912, SHOWING APPORTIONMENT AS BETWEEN CYLINDER AND FAN BUSINESS PREPARED ACCORDING TO METHOD ADOPTED IN BASIS NUMBER 1

	Total	Cylinder Business	Fan Business
Year Ending December 31, 1906:			
Experimental Expenditure	$ 8,138.91	82.96	8,055.95
Litigation Expenses	5,444.58		
Patent Expenses	2,520.97	90.57	7,874.98
Total	16,104.46	173.53	15,930.93
Year Ending December 31, 1907:			
Experimental Expenditure	7,424.01	994.38	6,429.63
Litigation Expenses	10,032.14		
Patent Expenses	4,141.74	3,684.70	10,489.18
Total	21,597.89	4,679.08	16,918.81
Year Ending December 31, 1908:			
Experimental Expenditure	9,525.48	2,896.49	6,628.99
Litigation Expenses	3,944.02		
Patent Expenses	5,135.19	4,690.24	4,388.97
Total	18,604.69	7,586.73	11,017.96
Year Ending December 31, 1909:			
Experimental Expenditure	11,992.14	3,355.81	8,636.33
Litigation Expenses	2,957.52		
Patent Expenses	6,631.05	4,678.75	4,909.82
Total	21,580.71	8,034.56	13,546.15
Year Ending December 31, 1910:			
Experimental Expenditure	13,042.30	4,801.54	8,240.76
Litigation Expenses	3,072.51		
Patent Expenses	9,940.14	7,737.22	5,275.43
Total	26,054.95	12,538.76	13,516.19
Year Ending December 31, 1911:			
Experimental Expenditure	11,926.75	5,368.60	6,558.15
Litigation Expenses	1,681.86		
Patent Expenses	15,577.66	10,424.76	6,834.76
Total	29,186.27	15,793.36	13,392.91
Eight Months to August 31, 1912:			
Experimental Expenditure	11,714.62	4,061.90	7,652.72
Litigation Expenses	4,435.00		
Patent Expenses	18,090.68	13,235.10	9,290.58
Total	34,240.30	17,297.00	16,943.30
Total for period from January 1, 1906, to August 31, 1912	$ 167,369.27	66,103.02	101,266.25

DEFENDANT'S EXHIBITS
21, 22, 23, 26, 27, 61.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION.

THE COMPUTING SCALE COMPANY
vs.
TOLEDO COMPUTING SCALE COMPANY. } No. 30,024.

Filed
May 6, 1918
At .... O'clock .... M.
T. C. MacMillan,
Clerk

Charles B. Morrison,
Master in Chancery.

Defendant's Exhibit No. 21. 2009

DEFENDANT'S EX. 21

DEFENDANT'S EXHIBIT 21
For identification, Oct. 26, 1916, C. B. M., Master

THE TOLEDO SCALE COMPANY

STATEMENTS OF PROFIT AND LOSS

FOR THE YEAR ENDED DECEMBER 31, 1911

MARKED EXHIBITS I, II AND III

Price, Waterhouse & Co.
134 South La Salle Street
Chicago

THE TOLEDO SCALE COMPANY

STATEMENT OF PROFIT AND LOSS ACCOUNT—FOR YEAR ENDING DECEMBER 31, 1911

Divided as between Cylinder and Fan Scale business on the basis of an actual allotment to the respective businesses in Cylinder and Fan Scales of all Expenses and Losses directly chargeable to one or the other, as determined by a detailed analysis of the Accounts by Price, Waterhouse & Co., adjusted in respect of Loses on Agents' Accounts to introduce an allowance (equivalent to 3% of the Gross Sales) sufficient to cover the losses incurred on advances made during the year 1911 and to allow for Interest on the Capital Invested in the business at the rate of 5% per annum.

DESCRIPTION	New Cylinder Scale Business		New Fan Scale Business		Business in 2nd Hand Repossessed and otherwise used Scales—all Makes	
	Costs and Expenses	Revenues	Costs and Expenses	Revenues	Costs and Expenses	Revenues
Number of Scales Shipped and Sold		*5,297*		*8,453*		
Gross Sales value (approximate List prices)		$800,554.02		$518,320.57		$111,651.34
Deduct—"Charge Backs," viz.—						
Scales Returned, "Pulled", Repossessed or Order Cancelled—						
Number of Scales		*665*		*810*		
Gross Sales Value as originally billed		93,386.17		59,168.45		3,273.00
Balance, being Net "Firm" Sales, viz.—						
Number of Scales		*4,632*		*7,643*		
Gross Sales Value		$707,167.85		$459,152.12		$108,378.34
Deductions from Gross Sales value of "Firm" Sales (i. e., from List prices)—						
Price Allowances on Scales sold in "Trade" for old scales taken in (Charged according to the amounts actually allowed on each Scale sold)—						
On Toledo Scales taken in		$ 23,631.03		$ 3,571.44		$ 215.00
On Scales of other Makes taken in		84,793.27		15,580.18		1,175.67
Other Special Allowances (charged according to the amounts actually allowed on each Scale Sold)		8,774.18		12,564.73		189.75
Total Deductions from Gross Sales value, specifically charged		$117,198.48		$ 31,716.35		$ 1,580.42
Add—Similar Allowances, the specific distrubition of which by Scales sold could not be traced (pro-rated on basis of specifically charged items)		686.58		180.40		7.67
Total of all Deductions		$117,885.06		$ 31,896.75		$ 1,588.09
% to Net Sales		*16.670*		*6.947*		*1.465*
Balance, being Net Billing value of "Firm" Sales		$589,282.79		$427,255.37		$106,790.25
Manufacturing Cost and Commercial Expenses—						
Factory Cost respectively of "Firm" New Scale Sales and of Repossessed Scales sold as 2nd Hand or "Used", viz.—						
(1) Estimated Costs of each Scale sold furnished by the Company, including Factory Overhead Expenses	$124,068.65		$122,349.92		$ 37,315.25	
(2) The amount by which the actual costs (in the aggregate) exceeded the aggregate estimated costs (pro-rated on the basis of the estimated Costs as above)	18,999.19		18,735.79		.....	
Together, being total Factory Costs of New Scales	$143,067.84		$141,085.71		$ 37,315.25	
% to Net Sales	*20.231*		*30.727*		*54.451*	
Factory Cost of Renovating and Refinishing "Repossessed", 2nd Hand or Used Scales, including Freight Inwards on said Scales	.....		.....		24,068.34	
Agents' and Managers' Commissions entered during the year, but exclusive of Commission on Forfeited Installments of Repossessed Scales—						
Proportion charged according to the amount actually credited on each transaction	188,229.85		130,680.38		28,683.95	
Proportion, the specific distribution of which could not be traced, pro-rated on basis of specifically charged items as above	712.09		495.30		108.59	
% to Net Sales (Total Agents' Commissions)	*26.718*		*28.569*		*26.567*	
Losses on Agents' and Customers' Accounts—pro-rated on basis of Gross Sales	24,016.62		15,549.62		3,374.09	
All other Commercial Expenses, viz.: Administration and General Expenses—pro-rated on basis of Gross Sales	226,045.27		146,347.75		31,547.78	
Together, being total Manufacturing Cost and Commercial Expenses	$582,071.67		$434,158.76		$125,098.00	
Forward	$582,071.67	$589,282.79	$434,158.76	$427,255.37	$125,098.00	$106,790.25

DESCRIPTION	New Cylinder Scale Business		New Fan Scale Business		Business in 2nd Hand Repossessed and otherwise used Scales—all Makes	
	Costs and Expenses	Revenues	Costs and Expenses	Revenues	Costs and Expenses	Revenues
Forward	$582,071.67	$589,282.79	$434,158.76	$427,255.37	$ 125,098.00	$106,790.25
Credit arising from Installments Forfeited on "Pulled" and Repossessed Scales, applied against cost of Transportation to Factory, Renovation, Refinishing and Expenses incidental to subsequent Re-Sale thereof, less Agents' Commissions ($7,603.54) allowed on such Installments						16,480.30
Loss on sale of 2nd Hand and Repossessed or otherwise used Scales—pro-rated between Cylinder and Fan Scale business on the basis of the total number of old units contributed by each	1,168.25		659.20			1,827.45
Interest on Capital Invested in Domestic and Foreign Scale business (i. e., excluding Investment in Canadian and Vulcanizing Business) at the rate of 5% per annum divided as between the Cylinder and Fan Scale business on the basis of Gross Sales	30,349.50		19,650.50			
Miscellaneous Charges or Credits	10.00			229.00		
Total Costs and Expenses and Net Billing Values respectively	$613,599.42	$589,282.79	$454,468.46	$427,484.37	$125,098.00	$125,098.00
Balance, being Net Profit or *Loss* on Cylinder and Fan Scale Business respectively		*24,316.63*		*26,984.09*		
% to Net Sales		*3.438*		*6.877*		
Totals	$613,599.42	$613,599.42	$454,468.46	$454,468.46	$125,098.00	$125,098.00

RECONCILIATION WITH PROFIT AND LOSS ACCOUNT AS SHOWN BY THE BOOKS

Net Profits as per books before charging Interest on Capital Investment or Losses on Agents' Balances			$33,276.25
Add—Back Amount deducted for Interest on Borrowed Money			28,432.90
Making the Total Profit from all Operations before charging Losses on Agents' Balances or Interest on Investment			$61,709.15
Of which there was Earned:			
From the Canadian Business		$24,080.32	
From Royalties		1,292.71	
Less Loss on Vulcanizer Business		*4,774.86*	20,598.17
Leaving as the Profits from the Operations of the Combined Scale Business, before charging Losses on Agents' Balances and Interest on Capital Investment			$41,110.98
	Cylinder Scales	Fan Scales	
Divided as to—			
Cylinder Scales Business	$31,843.50		
Fan Scales Business		$ 9,267.48	
Deduct—			
Interest allowed on Capital Investment	*$30,349.50*	*$19,650.50*	*50,000.00*
Loss on Agents' Balances	*$25,810.63*	*16,601.07*	*42,411.70*
Balance, being Net *Loss* from the Operations of the Scale Business as follows:	*$24,316.63*	*$26,984.09*	*$51,300.72*

THE TOLEDO SCALE COMPANY

STATEMENT OF PROFIT AND LOSS ACCOUNT — FOR YEAR ENDING DECEMBER 31, 1911

Divided as between Cylinder and Fan Scale business on the basis of Marwick, Mitchell & Company's computation of Cylinder Scale Profits submitted in evidence, and treating the residue, in accordance with Mr. Hall's testimony, as representing the relative Revenue and Expenses appertaining to the Fan Scales

Particulars	New Cylinder Scale Business			Residue, representing New Fan Scale Business		
Original Scales—						
Number of Scales			*5,329*			*8,453*
Amount			$803,657.26			$525,227.10
Deduct—Charges to Sales and Charge Backs—						
Number of Scales			*654*			*810*
Amount			77,985.87			49,456.83
Balance, being Net Sales—						
Number of Scales			*4,675*			*7,643*
Amount			$725,671.39			$475,770.27
Deduct—Allowances for Exchange and 2nd Hand Scales, etc.—						
Exchange Scale Allowances		$17,547.09			$11,504.38	
Toledo Scale Allowances		59,824.53			39,222.71	
Special Allowances		13,346.12			8,750.11	
Total Allowances			90,717.74			59,477.20
% to Net Sales			*12.501*			*12.501*
Balance			$634,953.65			$416,293.07
Net Proceeds from Sales of Refinished and 2nd Hand Scales—						
Sales		$57,271.49			$37,548.86	
Less						
Agents' Commissions	$18,286.28			$11,989.01		
Losses on Agents' Accounts	1,718.14	20,004.42		1,126.47	13,115.48	
			37,267.07			24,433.38
			$672,220.72			$440,726.45
Cost of Scales Sold—						
Material and Labor		$ 74,151.95			$135,921.23	
Overhead Expense		59,447.62			72,500.73	
Together		$133,599.57			$208,421.96	
% to Net Sales		*18.411*			*43.807*	
Commissions to Agents		175,265.75			151,886.51	
% to Net Sales		*24.158*			*31.924*	
Commercial and Selling Overhead Expense		245,602.70			161,024.29	
Losses on Agents' and Customers' Accounts—3% of Sales		21,770.14			14,273.11	
Depreciation on Buildings		303.13			303.13	
			576,541.29			535,909.00
Net Profit or *Loss* on Manufacture and Sale of Scales, before charging Interest			$ 95,679.43			$ *95,182.55*
% to Net Sales			*13.185*			*20.006*

Defendant's Exhibit No. 21. 2013

THE TOLEDO SCALE COMPANY

STATEMENT OF PROFIT AND LOSS ACCOUNT — FOR YEAR ENDING DECEMBER 31, 1911

Divided as between Cylinder and Fan Scale business on the basis of an actual allotment to the respective businesses in Cylinder and Fan Scales of all Expenses and Losses directly chargeable to one or the other, as determined by a detailed analysis of the accounts by Price, Waterhouse & Company and adopting Marwick, Mitchell & Company's allowance of 3% of the Net Sales as representing a fair charge for Losses on Agents' and Customers' Accounts, but before making any allowance for Interest on Capital Invested.

DESCRIPTION	New Cylinder Scale Business		New Fan Scale Business		Business in 2nd Hand, Repossessed and otherwise used Scales —all Makes	
	Costs and Expenses	Revenues	Costs and Expenses	Revenues	Costs and Expenses	Revenues
Number of Scales Shipped and Sold		*5,297*		*8,453*		
Gross Sales value (approximate List Prices)		$800,554.02		$518,320.57		$111,651.34
Deduct—"Charge Backs", viz.—						
Scales Returned, "Pulled", Repossessed or Order cancelled—						
Number of Scales		*665*		*810*		
Gross Sales value as originally billed		93,386.17		59,168.45		3,273.00
Balance, being Net "Firm" Sales, viz.—						
Number of Scales		*4,632*		*7,643*		
Gross Sales value		$707,167.85		$459,152.12		$108,378.34
Deductions from Gross Sales value of "Firm" Sales (i. e., from List Prices)—Price Allowance on Scales sold in "Trade" for old Scales taken in (Charged according to the amounts actually allowed on each Scale sold)—		$ 23,631.03		$ 3,571.44		$ 215.00
On Toledo Scales taken in		84,793.27		15,580.18		1,175.67
" Scales of other Makes taken in						
Other Special Allowances (Charged according to the amounts actually allowed on each Scale sold)		8,774.18		12,564.73		189.75
Total Deductions from Gross Sales value, specifically charged		$117,198.48		$ 31,716.35		$ 1,580.42
Add—Similar Allowances, the specific distribution of which by Scales sold could not be traced (pro-rated on basis of specifically charged items)		686.58		180.40		7.67
Total of all Deductions		$117,885.06		$ 31,896.75		$ 1,588.09
% to Net Sales		*16.670*		*6.947*		*1.465*
Balance, being Net Billing value of "Firm" Sales		$589,282.79		$427,255.37		$106,790.25
Manufacturing Cost and Commercial Expenses—						
Factory Cost respectively of "Firm" New Scales Sales and of Repossessed Scales sold as 2nd Hand or "Used," viz.—						
(1) Estimated Costs of each Scale sold furnished by the Company, including Factory Overhead Expense	$124,068.65		$122,349.92		$ 37,315.25	
(2) The amount by which the actual costs (in the aggregate) exceeded the aggregate estimated costs (pro-rated on the basis of the estimated costs as above)	18,999.19		18,735.79		.....	
Together, being total Factory Cost of New Scales	$143,067.84		$141,085.71		$ 37,315.25	
% to Net Sales	*20.231*		*30.727*		*34.451*	
Factory Cost of Renovating and Refinishing "Repossessed", 2nd Hand or Used Scales, including Freight Inwards on said Scales	.....		.....		24,068.34	
Agents' and Managers' Commissions entered during the year, but exclusive of Commission on Forfeited Installments of Repossessed Scales—						
Proportion charged according to the amount actually credited on each transaction	188,220.85		130,680.38		28,683.95	
Proportion, the specific distribution of which could not be traced, pro-rated on basis of specifically charged items as above	712.09		495.30		108.59	
% to Net Sales	*26.718*		*28.569*		*26.567*	
Losses on Agents' and Customers' Accounts—pro-rated on basis of Net Sales	21,770.14		14,273.11		2,844.61	
All other Commercial Expenses, viz., Administration and General Expenses—pro-rated on basis of Gross Sales	226,045.27		146,347.75		31,547.78	
Together, being total Manufacturing Cost and Commercial Expenses	$579,825.19		$432,882.25		$124,568.52	
Forward	$579,825.19	$589,282.79	$432,882.25	$427,255.37	$124,568.52	$106,790.25

DESCRIPTION	New Cylinder Scale Business		New Fan Scale Business		Business in 2nd Hand, Repossessed and otherwise Used Scales —all Makes	
	Costs and Expenses	Revenues	Costs and Expenses	Revenues	Costs and Expenses	Revenues
Forward	$579,825.19	$589,282.79	$432,882.25	$427,255.37	$124,568.52	$106,790.25
Credit arising from Installments Forfeited on "Pulled" and Repossessed Scales, applied against cost of Transportation to Factory, Renovating, Refinishing and Expenses incidental to subsequent Re-Sale thereof, less Agents' Commissions ($7,603.54) allowed on such Installments						16,480.30
Loss on Sale of 2nd Hand and Repossessed or otherwise used Scales—pro-rated between Cylinder and Fan Scale Business on the basis of the total number of old units contributed by each	829.77		468.20			1,297.97
Miscellaneous Charges or Credits	10.00			229.00		
Total Cost and Expenses and Net Billing Values respectively	$580.664.96	$589,282.79	$433,350.45	$427,484.37	$124,568.52	$124,568.52
Balance, being Net Profit or *Loss* on Cylinder and Fan Scale Business respectively	8,617.83			*5,866.08*		
% to Net Sales	*1.219*			*1.278*		
Totals	$589,282.79	$589,282.79	$433,350.45	$433,350.45	$124,568.52	$124,568.52

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RECONCILIATION WITH PROFIT AND LOSS ACCOUNT AS SHOWN BY THE BOOKS

Net Profits as per Books before charging Losses on Agents' Balances			$33,276.25
Add—Back amount deducted for Interest on Borrowed Money			28,432.90
Making the Total Profit from all Operations before charging Losses on Agents' Balances			$61,709.15
Of which there was Earned—			
From the Canadian Business		$24,080.32	
From Royalties		1,292.71	
Less—*Loss* on Vulcanizer Business		*4,774.86*	
			20,598.17
Leaving as the Profits from the Operations of the Combined Scale Business before charging Losses on Agents' Balances			$41,110.98
	Cylinder Scales	Fan Scales	
Divided as to—			
Cylinder Scale Business	$31,843.50		
Fan Scale Business		$9,267.48	
Deduct—Loss on Agents' Balances	*23,225.66*	*15,133.57*	*38,359.23*
Balance, being Net Profit from the Operations of the Scale Business	$ 8,617.84	*$ 5,866.09*	$ 2,751.75

Defendant's Exhibit No. 22. 2015

DEFENDANT'S EXHIBIT 22
For identification Oct. 26, 1916, C. B. M., Master

THE TOLEDO SCALE COMPANY

MEMORANDA OF DIFFERENCES IN PROFIT AND LOSS ACCOUNTS
YEAR ENDING DECEMBER 31, 1911
OF CYLINDER SCALE BUSINESS
AS REPORTED BY MARWICK, MITCHELL & COMPANY
AND PRICE, WATERHOUSE & COMPANY, RESPECTIVELY

Price, Waterhouse & Co.
134 South La Salle Street
Chicago

THE TOLEDO SCALE COMPANY

COMPARATIVE STATEMENT OF PROFIT AND LOSS ACCOUNT OF NEW CYLINDER SCALE BUSINESS FOR YEAR ENDING DECEMBER 31, 1911, AS COMPILED BY MARWICK, MITCHELL AND COMPANY AND PRICE, WATERHOUSE AND COMPANY RESPECTIVELY

PARTICULARS	As compiled by Marwick, Mitchell & Co.		As compiled by Price, Waterhouse & Co.		DIFFERENCES *Red figures denote Decreases in Revenues and Increases in Expenses and Costs by Price, Waterhouse and Company*	
	Costs and Expenses	Revenues	Costs and Expenses	Revenues	Black figures denote Increases in Revenues and Decreases in Expenses and Costs by Price, Waterhouse and Company	
					Costs and Expenses	Revenues
Original Sales:						
Number of Scales		*5,329*		*5,297*		
Amount		$803,657.26		$800,554.02		*$ 3,103.24*
Deduct—Charges to Sales and Charge Backs:						
Number of Scales		*654*		*685*		
Amount		77,985.87		93,386.17		*15,400.30*
Balance, being Net Sales						
Number of Scales		*4,675*		*4,632*		
Amount		$725,671.39		$707,167.85		*$ 18,503.54*
Deduct—Allowances for Exchanges and 2nd Hand Scales:						
Exchange Scale Allowances		$ 17,547.09		$ 23,631.03		*$ 6,083.94*
Toledo do		59,824.53		84,793.27		*24,968.74*
Special do		13,346.12		8,774.18		4,571.94
Unallocated Allowances pro-rated		.....		686.58		*686.58*
Total Allowances		$ 90,717.74		$117,885.06		*$ 27,167.32*
% to Net Sales		*12.501*		*16.670*		
Balance		$634,953.65		$589,282.79		*$ 45,670.86*
Manufacturing Cost and Commercial Expenses:						
Factory Cost	$133,599.57		$143,067.84		*$ 9,468.27*	
% to Net Sales	*18.411*		*20.231*			
Commissions to Agents—						
Allocated	175,265.75		188,229.85		*12,964.10*	
Unallocated	.....		712.09		*712.09*	
% to Net Sales	*24.152*		*26.718*			
Losses on Agents' Balances	21,770.14		24,016.62		*2,246.48*	
All other Commercial Expenses	245,602.70		226,045.27		19,557.43	
% to Net Sales	*33.844*		*31.964*			
Salvage or *Loss* on Sale of Refinished and 2nd Hand Scales		37,267.07		*1,168.25*		*38,435.32*
Depreciation on Buildings	303.13				303.13	
Miscellaneous Charges and Credits			10.00		*10.00*	
Interest on Investment			30,349.50		*30,349.50*	
Total Costs and Expenses and Net Revenues respectively	$576,541.29	$672,220.72	$612,431.17	$588,114.54	*$ 35,889.88*	*$ 84,106.18*
Balance, being Net Profit or *Loss*	95,679.43		*24,316.63*		*$119,996.06*	
Totals	$672,220.72	$672,220.72	$588,114.54	$588,114.54		

Defendant's Exhibit No. 22. 2017

THE TOLEDO SCALE COMPANY

SUMMARY OF DIFFERENCES IN GROSS CYLINDER SCALE SALES AS REPORTED BY MARWICK, MITCHELL AND COMPANY AND PRICE, WATERHOUSE AND COMPANY RESPECTIVELY

			Number	Amount
Gross Sales as reported by Marwick, Mitchell & Co.			5,329	$803,657.26
Add—Adjustments increasing the Gross Sales—				
One Number 346 cylinder scale, Voucher No. 426 February 1911, treated by Marwick, Mitchell and Company as deduction from Exchange Scales		$135.00	1	
6 Scales 1—#181	$115.00			
2— 381	307.00			
1— 382	80.00			
1— 383	195.00			
1— 581	125.00	822.00	6	957.00
Shipped in substitution for a corresponding number of new Scales returned. Note the corresponding entry for the Scales returned appears under the adjustment of "Charge Backs". In Marwick, Mitchell and Company's report only the difference in value between the substituted and returned scales is dealt with in the "Charge Backs".				
Deduct—Adjustments decreasing the Gross Sales—				
Second Hand and Rebuilt Cylinder Scales included by Marwick, Mitchell and Company in new cylinder scale sales, treated by Price, Waterhouse and Company as 2nd Hand Scale Sales	*$1,953.00*			
	2,057.99	*$4,010.99*	*39*	
Accessories included in Cylinder Scale Sales by Marwick, Mitchell and Company, treated by Price, Waterhouse and Company as Miscellaneous Sales		*49.25*		*4,060.24*
Gross Cylinder Scale Sales as reported by Price, Waterhouse and Company			5,297	$800,554.02

THE TOLEDO SCALE COMPANY

SUMMARY OF DIFFERENCES IN "CHARGE BACKS" AND DEBITS TO CYLINDER SCALE SALES AS REPORTED BY MARWICK, MITCHELL & CO. AND PRICE, WATERHOUSE & CO. RESPECTIVELY

Particulars		Number	Amount
"Charge Backs" and debits to Cylinder Scale Sales as reported by Marwick, Mitchell & Co.		654	$77,985.87
Add—Adjustments increasing "Charge Backs" and debits to sales—			
#346 Cylinder Scale repossessed not included in Marwick, Mitchell & Company's statements		1	125.00
Amount by which "Charge Backs" in respect of repossessed scales were understated by Marwick, Mitchell & Co.		...	15,517.70
This understatement of the "Charge Backs" arises by reason of the bookkeeping entries in respect to repossessed scales having been incompletely recorded by the Company. Instead of reversing the entire transaction and thus relieving the various accounts involved of the respective amounts credited or charged to them (for example, sales, allowances, commissions, etc.) and transferring the Forfeited Instalments to a separate account, merely one simple entry was made relieving the customer's account of the unpaid balance which was thereupon charged as a composite amount to "Charge Backs" Account. The above entry is required to raise this charge to the full Billing Value of the original sale and incidentally per contra to cancel the allowances, commissions, etc. abrogated by the repossession and to record instalments Forfeited as under—			
Allowances on original sale cancelled—			
Exchange Scale Allowances	$ 1,584.50		
Toledo Scale Allowances	97.00		
Special Allowances	465.00		
Balance of Commission Cancelled	528.00		
Instalments received prior to repossession forfeited	12,843.20		
Total amount undercharged to "Charge Backs" as above	$15,517.70		
Forward		655	$93,628.57

Defendant's Exhibit No. 22. 2019

Particulars	Number	Amount
Forward	655	$93,628.57
Amount by which "Charge Backs" resulting from substituted shipments (i. e., where a customer first took a Cylinder Scale and later returned it for substitution by a Fan Scale) were understated by reason of their treating with Net Differences in billing values instead of the full billing values, thus in the case of the substitution of Fan Scales for Cylinder Scales understating the amount of the "Charge Backs" in the Cylinder Scales by the amount of the billing value of the new Fan Scales shipped in substitution	3	711.50
Value of 6 Cylinder Scale returned to be substituted by a corresponding number of new Scales shipped (See the statement of Adjustments of Gross Sales). In the accounts of Marwick, Mitchell & Co. only the difference in the billing value was dealt with in the "Charge Back" Account, and this entry is required to increase the amount to the actual billing value of the Scales originally shipped, and, per contra, in the Gross Sales to record the full value of the Scales shipped in substitution.	6	822.00
Items as enumerated below, erroneously credited to "Charge Backs", thereby understating the gross amount of "Charge Backs". This entry is required to transfer the erroneous entries to the credit of—		
Special Allowances		95.46
Advertising Credits		80.00
Legal Expense Credits		4.06
#381 Cylinder Scale returned (See Section 3 Voucher 4660 July 1911) in respect of which the "Charge Back" entry was understated by Marwick, Mitchell & Co. in the amount of $60.00. The error arose through the Journal Voucher containing a reference to one Cylinder Scale and one Fan Scale, and the amount of the credit was therefore split between the two by Marwick, Mitchell & Co., although only one Cylinder Scale was returned. This entry is therefore required to increase the "Charge Backs" on Cylinder Scales and to relieve the "Charge Backs" on Fan Scales	1	60.00
Forward	665	$95,401.59

Particulars		Number	Amount
Forward		665	$95,401.59
Deduct—Adjustments decreasing "Charge Backs" and Debits to Sales—			
Items erroneously included as "Charge Backs" in accounts of Marwick, Mitchell & Co. as under—			
Accessories Returns and Allowances	$107.32		
Collection Expenses	5.55		
Special Allowances	10.00		
Loss on Bills Receivable	230.00		
Return Loaner Scales	25.00		375.87
This entry is required to relieve the "Charge Back" Account and to transfer items to the proper account.			
3 #405 Fan Scales returned by customers erroneously charged by Marwick, Mitchell & Co. as Cylinder Scales			105.00
Second Hand Scales purchased at Branch Offices erroneously included by Marwick, Mitchell & Co. in "Charge Backs"			49.55
8 Scales originally sold as Second Hand, "Pulled", Repossessed or Returned, treated by Marwick, Mitchell & Co. as new Cylinder Scale Returns or Repossessions, and this entry is required to relieve the new Cylinder "Charge Backs" of the amount, and to transfer it to its proper account			938.00
Customers' Uncollectible Accounts written off, treated by Marwick, Mitchell & Co. as Cylinder Scale "Charge Backs" and by Price, Waterhouse & Co. as Bad Debt Losses			347.00
"Charge Backs" and Debits to Cylinder Scale Sales as reported by Price, Waterhouse & Co.		665	$93,386.17

Defendant's Exhibit No. 22.

THE TOLEDO SCALE COMPANY

SUMMARY OF DIFFERENCES IN TOLEDO SCALE ALLOWANCES AS REPORTED BY MARWICK, MITCHELL AND COMPANY AND PRICE, WATERHOUSE AND COMPANY RESPECTIVELY

Particulars		Total Toledo Scale Allowances	Proportion Chargeable to Cylinder Scale Business
Toledo Scale Allowances chargeable to Cylinder Scale Business as computed by Marwick, Mitchell and Company at 60.40% of total Toledo Scale Allowances, viz.—			
Total Toledo Scale Allowances as per Books		$29,051.47	
60.40% thereof			$17,547.09
Add—Adjustments increasing book balance—			
Allowance on 3 Toledo Scales taken in trade on sale of Cylinder Scales erroneously included in "Charge Backs" of Fan Scales		190.00	
Proceeds of Sales of 2 2nd Hand Non-computing Scales erroneously credited to Toledo Scale Allowances and now transferred to 2nd Hand Sales		20.00	
Deduct—Adjustments decreasing book balance—			
Special Allowances made to Customers not involving a return Scale erroneously charged to Toledo Scale Allowances and now transferred to Special Allowances		*1,505.75*	
Amount of Price Allowances abrogated, by reason of repossession of New Scales on which such allowances were made, not previously written back to the credit of this account as they should have been because of the Repossession having been recorded by means of a composite entry which was charged to "Charge Backs" Account, namely—			
In Cylinder Scale "Charge Backs"	*$97.00*		
In Fan Scale "Charge Backs"	*40.00*	*137.00*	
Total Toledo Scale Allowances as adjusted		$27,618.72	
Chargeable as determined by a detailed analysis of the respective items as under:			
To Cylinder Scale Business		$23,631.03	23,631.03
To Fan Scale Business		3,571.44	
To 2nd Hand Scale Business		215.00	
Unallocated items to pro-rate		201.25	
Total as above		$27,618.72	
Difference between amount as estimated by Marwick, Mitchell and Company and as actually chargeable as determined by analysis			*$ 6,083.94*

THE TOLEDO SCALE COMPANY

SUMMARY OF DIFFERENCES IN "EXCHANGE SCALE ALLOWANCES" AS REPORTED BY MARWICK, MITCHELL & COMPANY AND PRICE, WATERHOUSE & COMPANY RESPECTIVELY

Particulars		Total Exchange Scale Allowances	Proportion chargeable to Cylinder Scale Business
Exchange Scale Allowances chargeable to Cylinder Scale Business as computed by Marwick, Mitchell & Company at 60.40% of the total Exchange Scale Allowances, viz.—			
Exchange Scale Allowances as per books		$ 99,047.24	
60.40% thereof			$59,824.53
Add—Adjustments increasing book balance—			
Items as enumerated below, erroneously credited to Exchange Scale Allowances, thereby understating the gross amount of Exchange Scale Allowances. This entry is required to transfer the erroneous entries to the credit of—			
Discount	$7.00		
Accessories Sales	6.50	13.50	
Value of Cylinder, Fan and 2nd Hand Scales sold, erroneously credited to Exchange Scale Allowances, thereby understating both the gross Sales and Exchange Scale Allowances. This entry is required to transfer the erroneous entries to the credit of—			
Cylinder Scale Sales	$ 135.00		
Fan Scale Sales	770.00		
2nd Hand Scale Sales	5,226.00	6,131.00	
Deduct—Adjustments decreasing book balance—			
Special Allowances made to customers not involving a return scale erroneously charged to "Exchange Scale Allowances" now transferred to Special Allowances		*597.82*	
Items erroneously charged to Exchange Scale Allowances now transferred to the proper accounts—			
Loaner Scales Returned	*$532.50*		
Collection Expense	*10.90*	*543.40*	
Amount of Price Allowances abrogated, by reason of repossession of new scales on which such allowances were made, not previously written back to the credit of this account as they should have been because of the repossession having been recorded by means of a composite entry which was charged to "Charge Backs" Account, namely—			
In Cylinder Scale "Charge Backs"	*$1,584.50*		
" Fan Scale "Charge Backs"	*288.50*	*1,873.00*	
Total Exchange Scale Allowances as adjusted		$102,177.52	
Chargeable as determined by a detailed analysis of the respective items as under—			
To Cylinder Scale Business		$ 84,793.27	84,793.27
" Fan Scale Business		15,580.18	
" 2nd Hand Scale Business		1,175.67	
Unallocated items to pro-rate		628.40	
Total as above		$102,177.52	
Difference between amount as estimated by Marwick, Mitchell and Company and as actually chargeable as determined by analysis			*$24,968.74*

Defendant's Exhibit No. 22. 2023

THE TOLEDO SCALE COMPANY

SUMMARY OF DIFFERENCES IN SPECIAL ALLOWANCES AS REPORTED BY MARWICK, MITCHELL & COMPANY AND PRICE, WATERHOUSE & COMPANY RESPECTIVELY

Particulars		Total Special Allowances	Proportion Chargeable to Cylinder Scale Business
Special Allowances chargeable to Cylinder Scale Business as computed by Marwick, Mitchell and Company at 60.40% of the total special Allowances, viz.—			
Special Allowances as per books		$22,096.23	
60.40% thereof			$13,346.12
Add—Adjustments increasing book balance—			
Special Allowances made to Customers not involving a return Scale, erroneously charged to the following accounts, now transferred to Special Allowances—			
Exchange Scale Allowances	$ 597.82		
Toledo do.	1,505.75		
Fan Scales	20.00	2,123.57	
Special Allowances erroneously charged to Commissions Account, now transferred to Special Allowances		3.00	
Deduct—Adjustments decreasing book balance—			
Special Allowances erroneously credited to "Charge Backs", now transferred to the proper Account		*30.46*	
Allowances made to Customers in respect of Advertising erroneously charged to Special Allowances, now transferred to the proper Account		*1,891.68*	
Amount of Price Allowances abrogated, by reason of repossession of new scales on which such allowances were made, not previously written back to the credit of this account as they should have been because of the repossession having been recorded by means of composite entry which was charged to "Charge Backs" Account, namely—			
In Cylinder Scale "Charge Backs"	*$465.00*		
" Fan Scale "Charge Backs"	*262.00*	*727.00*	
Total Special Allowances as adjusted		$21,573.66	
Chargeable as determined by a detailed analysis of the respective items as under—			
To Cylinder Scale Business		$ 8,774.18	8,774.18
" Fan Scale Business		12,564.73	
" 2nd Hand Scale Business		189.75	
Unallocated items to pro-rate		45.00	
Total as above		$21,573.66	
Difference between amount as estimated by Marwick, Mitchell & Company and as actually chargeable to Cylinder Scale Business, as determined by analysis			$ 4,571.94

THE TOLEDO SCALE COMPANY

SUMMARY OF UNALLOCATED ITEMS

Unallocated Allowances pro-rated on the basis of the amounts actually chargeable to each as determined by a detailed analysis of 99.42% of the total Allowances:

Unallocated Allowances, viz.—	
Toledo Scale Allowances	$ 628.40
Exchange Scale Allowances	201.25
Special Allowances	45.00
	$ 874.65
Apportioned as under:	
To Cylinder Scale business	$ 686.58
" Fan " "	180.40
" 2nd Hand " "	7.67
Total as above	$ 874.65

Unallocated Commissions pro-rated on the basis of the amounts actually chargeable to each as determined by detailed analysis of 99.62% of the total Commissions:

Unallocated Commissions	$1,315.98
Apportioned as under:	
To Cylinder Scale business	$ 712.09
" Fan Scale "	495.30
" 2nd Hand " "	108.59
Total as above	$1,315.98

Defendant's Exhibit No. 22. 2025

THE TOLEDO SCALE COMPANY

SUMMARY OF DIFFERENCES IN COMMISSIONS AS REPORTED BY MARWICK, MITCHELL & COMPANY AND PRICE, WATERHOUSE & COMPANY, RESPECTIVELY

Particulars		Total Commissions	Proportion Chargeable to Cylinder Scale Business
Commissions as per Books		$357,427.55	
Commissions chargeable to Cylinder Scale Business as computed by Marwick, Mitchell and Company at an average of $37.49 per scale			$175,265.75
Deduct—Adjustments decreasing book balance—			
Items as enumerated below erroneously charged to Commissions now transferred to the proper accounts—			
Special Allowances	$ 3.00		
Freight	1.14		
Fan Scales returned	170.00		
Commissions on Accessories Sold	22.21	196.35	
Commissions on installments received from the Customers prior to re-possession by the Company which were forfeited and accordingly treated as "Forfeited Installments" in the accounts prepared by Price, Waterhouse and Company. This entry required to transfer amount of Commissions applicable thereto		7,603.54	
Balance of Agents' Commissions cancelled by reason of re-possession of new Scales on which such commissions were credited, not previously written back to the credit of this account as they should have been because of the re-possession having been recorded by means of a composite entry which was charged to "Charge Backs" Account, namely—			
In Cylinder Scale "Charge Backs"	$528.00		
" Fan Scale "Charge Backs"	189.50	717.50	
Total Commissions as adjusted		$348,910.16	
Chargeable as determined by detailed analysis of the respective items, as under—			
To Cylinder Scale business		$188,229.85	188,229.85
" Fan " "		130,680.38	
" 2nd Hand " "		28,683.95	
Unallocated Items to pro-rate		1,315.98	
Total as above		$348,910.16	
Difference between amount as estimated by Marwick, Mitchell and Company and as actually chargeable to Cylinder Scale Business as determined by detailed analysis			$12,964.10

THE TOLEDO SCALE COMPANY

SUMMARY OF DIFFERENCES IN COST OF CYLINDER SCALE SALES AS REPORTED BY MARWICK, MITCHELL & COMPANY AND PRICE, WATERHOUSE & COMPANY RESPECTIVELY

Cost of Cylinder Scale Sales as reported by Marwick, Mitchell & Company—			
Labor and Material			$ 74,151.95
Overhead Expense based on 80.17% of Combined Labor and Material			59,447.62
			$133,599.57
Adjustments reducting total cost of Cylinder Scale Sales—			
(1) Relative cost of Second Hand Scale Sales erroneously included by Marwick, Mitchell & Company as new Scale Sales, the sales value and cost of which in the accounts of Price, Waterhouse & Company have been transferred to Second Hand Scale Business		$1,140.96	
(2) Excessive proportion of Factory Overhead Expense allowed by Marwick, Mitchell & Company 11.41% of Combined Labor and Material, viz.—			
Ratio to Combined Labor and Material allowed by Marwick, Mitchell & Company	80.17%		
Ratio as computed by Price, Waterhouse & Company	68.76		
	11.41%	8,389.96	9,530.92
			$124,068.65
Adjustment increasing total cost of Cylinder Scale Sales—			
Proportionate amount by which the costs estimated by the officials as applied to the total production fell short of the total amount of money actually expended in the cost of the aggregate production— Total under-statement of cost of Cylinder and Fan Scales combined $37,734.98—pro-rated as between Cylinder and Fan Scales on the basis of the estimated costs appertaining to each of which there is chargeable to Cylinder Scales			18,999.19
Cost of Cylinder Scale Sales as reported by Price, Waterhouse & Company			$143,067.84

Defendant's Exhibit No. 22.

THE TOLEDO SCALE COMPANY

SUMMARY OF DIFFERENCES IN COMMERCIAL AND SELLING EXPENSES AS REPORTED BY MARWICK, MITCHELL & COMPANY AND PRICE, WATERHOUSE & COMPANY RESPECTIVELY

Particulars			Total Commercial and Selling Expenses	Proportion Chargeable to Cylinder Scale Business
Commercial and Selling Expenses chargeable to Cylinder Scale Business as computed by Marwick, Mitchell & Company at 60.40% of the total—				
Commercial and Selling Expenses as per Marwick, Mitchell & Company's statement			$406,626.99	
60.40% thereof				$245,602.70
Add—Adjustments increasing book balance—				
Items erroneously charged to the Accounts noted and now transferred to Commercial and Selling Expenses:				
Kind of Expense	Account Charged on Books			
Collection Expense	Toledo Scale Allowances	$ 3.55		
do.	Exchange Scale Allowances	10.90		
Advertising	Special Allowances	1,891.68		
Freight	Commissions	1.14		
Bills Receivable Losses	Toledo Scale Allowances	230.00	2,137.27	
Amount received for Repairs made on Customers' Scales treated as Miscellaneous Incomes in the accounts prepared by Price, Waterhouse & Co.			1,712.88	
Deduct—Adjustments decreasing book balance—				
Items erroneously credited to the following accounts, now transferred to Commercial and Selling Expenses:				
Kind of Expense	Account charged on Books			
Freight	Sales	*$ 5.04*		
Advertising	Toledo Scale Allowances	*80.00*		
Discount	Exchange Scale Allowances	*7.00*		
Legal Expense	Toledo Scale Allowances	*4.06*		
Bills Receivable Recovery	Sales	*39.00*	*135.10*	
	Forward		$410,342.04	$245,602.70

Particulars		Total Commercial and Selling Expenses	Proportion Chargeable to Cylinder Scale Business
Forward		$410,342.04	$245,602.70
Incoming Freight on Returned Scales and Insurance included by Marwick, Mitchell and Company in Commercial and Selling Expenses, considered in the accounts prepared by Price, Waterhouse and Company as properly chargeable to 2nd hand Scale Business and Manufacturing Expenses respectively—			
Incoming Freight on Returned Scales	$2,844.67		
Insurance	2,634.09	5,478.76	
Difference between book balance and the statement prepared by Marwick, Mitchell and Company		922.48	
Total Commercial and Selling Expenses as adjusted		$403,940.80	

Chargeable on the basis of the ratio of the Gross Scales as under:

	Gross Sales Amount	Gross Sales %		
To Cylinder Scale Business	$ 800,554.02	55.96	$226,045.27	226,045.27
" Fan Scale Business	518,320.57	36.23	146,347.75	
" 2nd Hand Scale Business	111,651.34	7.81	31,547.78	
Total Gross Sales and Expenses distributed	$1,430,525.93	100.00	$403,940.80	

Difference between amount as distributed by Marwick, Mitchell and Company and the amount as distributed by Price, Waterhouse and Company	$ 19,557.43

Defendant's Exhibit No. 22. 2029

THE TOLEDO SCALE COMPANY

SUMMARY OF DIFFERENCES IN VALUE OF "SALVAGE" APPERTAINING TO CYLINDER SCALE BUSINESS DERIVED FROM SALES OF SECOND HAND AND USED SCALES

PARTICULARS		As reported by Marwick, Mitchell & Co.	As reported by Price, Waterhouse & Co.
Proceeds from Sales	$94,820.35	$94,820.35	
Add—Adjustments increasing Sales—			
2nd Hand "Toledo" Scale Sales included in Cylinder and Fan Scale Sales as new	11,584.99		
Sales of 2nd Hand Scales erroneously credited to Exchange Scale and Toldeo Scale Allowances	5,246.00		$111,651.34
Charge Backs and Debits to Sales		*Nil*	
"Charge Backs" for return of Scales sold as 2nd Hand, erroneously charged to New Scale "Charge Backs" and now transferred			*3,273.00*
Balance Net Sales		$94,820.35	$108,378.34
Price Allowances on 2nd Hand Scales sold in "Trade" charged by Marwick, Mitchell & Co. to New Scale Allowances on basis of 60.40% to Cylinder and 39.60% to Fan		*Nil*	
Amounts actually chargeable to 2nd Hand Scales sold in "Trade" as determined by analysis, except as to $7.67, being the pro-rated proportion of the unallocated items			*1,588.09*
Manufacturing Cost, viz.—			
Factory Cost of Repossessed Scales sold as 2nd Hand or Used, including Purchase Cost of "bought" Scales (not allowed for by Marwick, Mitchell & Co.)		*Nil*	*37,315.25*
Cost of Renovating and Refinishing Repossessed, 2nd Hand or Used Scales, including Freight to Factory		*Nil*	*24,068.34*
Note— Included by Marwick, Mitchell & Co. as part of General Factory Overhead Expense, of which 36.12% was charged to Cylinder Scales.			
Agents' Commissions—			
16.62%, being ratio of 2nd Hand Sales to Fan and 2nd Hand Sales combined, of ($357,427.55, Total Commissions, less $175,265.75 proportion charged New Cylinder Sales)		*30,276.29*	
Amounts actually chargeable as determined by analysis, except as to $108.59, being the pro-rated proportion of the unallocated items		.....	*28,792.54*
Losses on Agents' and Customers' Accounts—3% of Sales		*2,844.61*	*3,374.09*
Commercial and Selling Expenses—			
Proportion appertaining to 2nd Hand business as pro-rated on the basis of Gross Sales			*31,547.78*
Pro-rated by Marwick, Mitchell & Co. as to 60.40% to New Cylinder Sales and 39.60% to New Fan Sales		*Nil*	
Credit for Installments received prior to Repossession on Scales later Repossessed or "Pulled" applied in this account against Cost of Transportation, Renovation, Refinishing, etc. credited by Marwick, Mitchell & Co. to New Scale Charge Backs—			
On Cylinder Scales	$12,843.20		
" Fan Scales	10,966.14		
" 2nd Hand Scales	274.50		
Together	$24,083.84		
Deduct—Commissions paid thereon	7,603.54	*Nil*	16,480.30
Balance, being so-called Net Salvage or *Loss*		$61,700.45	$ *1,827.45*
Apportioned as to Cylinder and Fan business as under—			
By Marwick, Mitchell & Co. on basis of Net Sales—			
New Cylinder Business 60.40%		$37,267.07	
New Fan Scale Business 39.60%		24,433.38	
By Price, Waterhouse & Co. on basis of Units contributed to 2nd Hand Business—			
From New Cylinder Scale Sales 3,610 Units or 63.928%			$ *1,168.25*
From New Fan Scale Sales 2,037 Units or 36.072%			*659.20*
Total as above		$61,700.45	$ *1,827.45*

For Iden.
DEF. EX. 23.

THE TOLEDO SCALE COMPANY
SUMMARY OF AMOUNTS BY WHICH THE NET PROFITS OF THE CYLINDER SCALE BUSINESS WERE OVER-ESTIMATED BY MARWICK, MITCHELL & COMPANY BY REASON OF THE REVENUES BEING OVER-STATED OR THE EXPENSES UNDER-ESTIMATED

Price, Waterhouse & Co.
134 South La Salle Street
Chicago

Defendant's Exhibit No. 23. 2031

THE TOLEDO SCALE COMPANY

SUMMARY OF AMOUNTS BY WHICH THE NET PROFITS OF THE CYLINDER SCALE BUSINESS WERE OVER-ESTIMATED BY MARWICK, MITCHELL & COMPANY BY REASON OF THE REVENUES BEING OVER-STATED OR THE EXPENSES UNDER-ESTIMATED

(1) Amount of Price Allowances appertaining to Cylinder Scale Sales under or *over* estimated by Marwick, Mitchell & Co. by reason of their adopting an arbitrary basis of apportionment of the total amount of Allowances, instead of the actual amounts chargeable to Cylinder Scales as shown by each transaction:

Class of Allowance	Amount chargeable to Cylinder Scales: As estimated by Marwick, Mitchell & Co. at 60.40% of the total	Amount chargeable to Cylinder Scales: Actual amounts chargeable as allocated by analysis of Price, Waterhouse & Co.	Difference under or *over* estimated by Marwick, Mitchell & Co.
On New Cylinder Scale Sales—			
Incidental to Toledo Scales	$17,547.09	$ 23,631.03	$ 6,083.94
Incidental to Exchange Scales	59,824.53	84,793.27	24,968.74
Special Allowances	13,346.12	8,774.18	*4,571.94*
Together	$90,717.74	$117,198.48	$26,480.74
Add — Items unallocated by Price, Waterhouse & Co.	.....	686.58	686.58
Total directly chargeable to New Cylinder Scale Sales.	$90,717.74	$117,885.06	$27,167.32
On 2nd Hand Scale Sales as determined by analysis $1,588.09 whereof apportioned to Cylinder Scales, viz., 63.928%	.....	1,015.23	1,015.23
Net Total under-estimated by Marwick, Mitchell & Co.			$28,182.55

(2) Amount of Agents' Commissions appertaining to Cylinder Scale Sales under-estimated by Marwick, Mitchell & Co. by reason of their adopting an average rate of $37.49 per Scale, instead of the actual amounts chargeable to Cylinder Scales as shown by each transaction—

Amount chargeable to New Cylinder Scales as estimated by Marwick, Mitchell & Co. at $37.49 per Scale	$175,265.75	
Actual amount chargeable as allocated by analysis of Price, Waterhouse & Co. including proportion of pro-rated unallocated items ($712.09)	188,941.94	
Forward	$ 13,676.19	$ 28,182.55

Forward			$ 13,676.19	$ 28,182.55
Amount chargeable to 2nd Hand Scales—As estimated by Marwick, Mitchell & Co. at 16.62% of $182,161.80 — $30,272.29				
Of which there was apportioned to Cylinder Sales 60.40%		$18,286.27		
Actual amount chargeable as allocated by analysis of Price, Waterhouse & Co.				
On 2nd Hand Sales	$28,792.54			
On Forfeited Installments	7,603.54			
Together	$36,396.08			
Of which apportionable to Cylinder Sales 63.928%		23,267.28	4,981.01	18,657.20
(3) Difference in amount chargeable to Cylinder Scale Business for Losses on Agents' Balances as computed by Marwick, Mitchell & Co. at 3% of Net Sales and Price, Waterhouse & Co. as 3% of Gross Sales				
On New Cylinder Scales			$ 2,246.48	
On 2nd Hand Scales $529.48, of which chargeable to Cylinder Sales			438.85	2,685.33
(4) Difference in amount chargeable to Cylinder Scale Business for Commercial and Selling Expenses as computed by Marwick, Mitchell & Co. and Price, Waterhouse & Co. respectively, by reason of the former adopting the Net Sales and the latter the Gross Sales as the basis of apportionment and by reason of minor adjustments in the accounts—				
Amount chargeable to Cylinder Scales as apportioned by Marwick, Mitchell & Co. 60.40% of total Expenses			$245,602.70	
Amount chargeable as apportioned by Price, Waterhouse & Co.—				
To New Cylinder Scales		$226,045.27		
To 2nd Hand Sales	$31,547.78			
Of which apportioned to Cylinder Scales 63.928%		20,167.86		
To 2nd Hand Scales for Freight Inwards	2,844.67			
Of which apportioned to Cylinder Scales		1,818.55	248,031.68	2,428.98
(5) Under-statement of Factory Cost of New Cylinder Scales by reason of estimates being below actual cost—				
Material, Labor and Overhead Cost as estimated by Marwick, Mitchell & Co.			$133,599.57	
Deduct—Amount included therein representing proportion of Refinishing Cost of Used Scales, viz., 12.89% of Material and Labor Cost			9,558.18	
Balance, being Cost of New Scales as estimated by Marwick, Mitchell & Co.			$124,041.39	
Actual Cost as determined by Price, Waterhouse & Co.			143,067.84	19,026.45
Forward				$ 70,980.51

Forward		$ 70,980.51
(6) Amount by which Net Cylinder Scale Sales as computed by Marwick, Mitchell & Co. were overstated by reason of 2nd Hand Scale Sales and Forfeited Installments and other items being improperly included therein—		
2nd Hand Scale Sales	$ 4,010.99	
Forfeited Installments	12,843.20	
Together	$ 16,854.19	
All other adjustments	1,649.35	18,503.54
(7) Amount by which Gross Sales and other Revenues of Business in 2nd Hand and Used Scales, including Forfeited Installments, applicable to New Cylinder Scales was *under-stated* by Marwick, Mitchell & Co. as computed and adjusted by Price, Waterhouse & Co. by reason of the difierent methods of treating Installments forfeited from all Scales and of apportioning the results of the 2nd Hand Business—		
Proportion of Proceeds from Sale of 2nd Hand Scales apportioned by Marwick, Mitchell & Co. to Cylinder Scales, viz., 60.40% of $94,820.35	$ 57,271.48	
Corresponding amount apportioned by Price, Waterhouse & Co. 63.928% of $94,820.35 —	60,616.75	
Difference, being additional amount apportioned by Price, Waterhouse & Co.	$ *3,345.27*	
Add—Amount by which 2nd Hand Scale Sales were increased by Price, Waterhouse & Co.—		
(1) By transfers from New Scale Sales—		
From New Cylinder Scale Sales	$ 4,101.99	
From New Fan Scale Sales	7,574.00	
Together	$ 11,584.99	
Of which apportioned back to Cylinder Scales	*7,406.05*	
(2) By transfers from Allowance Accounts	$5,246.00	
Of which apportioned back to Cylinder Scales	*3,353.66*	
Together	$ *14,104.98*	
Deduct—Proportion of Charge Backs applicable to 2nd Hand Business apportioned to Cylinder Scales (63.928% of $3,273.00)	2,092.36	
Net Increase by Price, Waterhouse & Co. in Proportion of 2nd Hand Scales apportioned to Cylinder Scales	$ *12,012.62*	
Add—Proportion of Forfeited Installments on all Scales apportioned back to Cylinder Scales, viz., 63.928% of $24,083.84	*15,396.31*	
Together, being total additional amount of Gross Revenues from 2nd Hand Business apportioned by Price, Waterhouse & Co. to Cylinder Scales	$ *27,408.93*	*27,408.93*
Forward		$ 62,075.12

Forward		$ 62,075.12
(8) Proportion of Refinishing Cost of Used Scales understated by Marwick, Mitchell & Co. by reason of such expense being included in General Overhead and apportioned to Cylinder Scales as such—		
Proportion included in General Overhead charged to Cylinder Scales by Marwick, Mitchell & Co. as above	$ 9,558.18	
Proportion chargeable to Cylinder Scales as based on Units contributed, viz., 63.928% of total amount	13,567.86	4,009.68
(9) Factory Cost of Repossessed Scales sold as 2nd Hand omitted altogether by Marwick, Mitchell & Co.—		
Cost of Cylinder and Fan Scales combined	$ 37,315.25	
Proportion chargeable to Cylinder Scale Business as based on Units contributed viz., 63.928% of total		23,854.89
(10) Interest on Investment not allowed by Marwick, Mitchell & Co. as calculated at 5% per annum on Capital Invested and apportioned on basis of Gross Sales		30,349.50
(11) Miscellaneous Adjustments		*293.13*
Total amount by which Profits of the Cylinder Scale Business were over-estimated by Marwick, Mitchell & Company		$119,996.06

For Iden.

DEF. EX. 26
Admitted subject to Objection

TOLEDO SCALE COMPANY

Memorandum of effect on the net results of the Cylinder and Fan Scale business for the year ending December 31, 1911 as reported by Price, Waterhouse & Co. should it be desired to adjust the Accounts as presented on the theory that all Repossessed Scales are ultimately sold as new Scales, and are so included in the Accounts and that the Salvage of the remaining Second-Hand business should be apportioned to the Cylinder and Fan Scale business on the basis of Sales.

Black figures indicate Debits or Charges to Accounts
Red figures indicate Credits to Accounts

PARTICULARS	Adjustment of 2nd Hand Account as originally reported by Price, Waterhouse & Co.	Relative Adjustment of Cylinder Business Account	Relative Adjustment of Fan Business Account
Retransfer back to New Scale Sale Accounts of Cylinder and Fan Scales entered as 2nd Hand—			
39 Cylinder Scales 59 Fan Scales	$ 6,435.49	$ *4,010.99*	$ *2,424.50*
Retransfer back to New Scale Sale Accounts of Forfeited Installments and	23,809.34	*12,843.20*	*10,966.14*
Commissions thereon	*7,512.04*	4,079.33	3,432.71
Retransfer of Manufacturing Cost of Repossessed Scales to Cylinder & Fan	*36,435.27*	18,344.78	18,090.49
Adjustment of Manufacturing Cost of Cylinder & Fan Scales to take up cost of Scale Sales retransferred to New Scales—			
Cost as estimated	.....	1,068.69	1,016.26
Relative adjustment of amount pro-rated	.....	*1,049.75*	*1,035.20*
Readjustment of amount pro-rated by reason of disturbance of base figures	.....	5.06	*5.06*
Readjustment of Commissions	*313.15*	.....	313.15
Readjustment of amounts pro-rated for—			
Agents' Losses	*193.06*	120.33	72.73
Commercial and General Expenses arising from change in Sales classification, thereby disturbing base figures	*1,837.93*	1,143.15	694.78
Total Adjustments required	$ *16,046.62*	$ 6,857.40	$ 9,189.22
Original proration of Loss on 2nd Hand Sales written back	1,827.45	*1,168.25*	*659.20*
Profit on 2nd Hand business as revised	$ *14,219.17*		
Pro-rated to Cylinder and Fan business on basis of Gross Sales—			
Cylinder 60.71% Fan 39.29%	14,219.17	*8,632.13*	*5,587.04*
Net Difference in Cylinder and Fan Losses reducing Cylinder Loss and increasing Fan Loss	.....	$ *2,942.98*	$ 2,942.98

For iden.

DEF. EX. 27. SHEET 1
Compls. Ex. 47

THE TOLEDO SCALE COMPANY

STATEMENT OF MANUFACTURING COST OF PRODUCTION AND FINISHED STOCK ACCOUNTS YEAR ENDING DECEMBER 31, 1911

DESCRIPTION	Manufacturing Cost of Production	Stock Accounts		Cost of Supplies, etc.
		New Scales	2nd Hand	
Inventories at Jan. 1, 1911—				
New Scales		$185,633.88		
Rebuilt and 2nd Hand			$ 3,896.25	
Loaners			2,991.40	
Value of Materials, Supplies, etc., used in production during the year	$ 83,618.32			
Expenditures for Productive Labor	80,960.74			
Factory Overhead Expenses as per statement attached	115,161.27			
	$277,740.33			
Deduct — Estimated Cost of Supplies and Accessories Sold	*2,496.20*			$ 2,496.20
Balance, being Cost of Material, labor and Expense chargeable to production of Scales for the year	$275,244.13			
Transferred to New Scale Stock Account	*$75,244.13*	275,244.13		
Cost of Cylinder and Fan Scales Pulled and Repossessed transferred to 2nd Hand Scale Stock Account	*36,435.27*		*36,435.27*	
Value of 2nd Hand Scales at Nov. 1, 1911, not previously taken up on books			23,885.34	
Value of Loaner Scales erroneously charged or credited to the following accounts now transferred to 2nd Hand Scale Stock Account—				
Charged to Toledo Scale Allowances			25.00	
Charged to Exchange Scale Allowances			532.50	
Credited to New Fan Scale Sales			*116.50*	
Cost of 2nd Hand Scales purchased, erroneously charged to the following accounts now transferred to 2nd Hand Scale Stock Account—				
Fan Scale Sales			45.00	
Cylinder Scale Sales			244.55	
		$424,442.74	$ 67,938.81	$ 2,496.20
Deduct—Inventories of Scales on hand at December 31, 1911		140,289.19	30,623.56	.....
Balance, being Cost of New Cylinder, New Fan and 2nd Hand Scales and Accessories sold during the year		$284,153.55	$ 37,315.25	$ 2,496.20

DEF. EX. 27. SHEET 2

THE TOLEDO SCALE COMPANY

STATEMENT OF FACTORY OVERHEAD EXPENSE

ACCOUNT	Amount
Indirect Labor	$ 28,510.92
Factory Supplies	13,259.27
Experimental	11,926.75
Tools and Patterns	9,543.63
Packing and Shipping	12,783.64
Lumber	1,698.25
Horse, Wagon and Feed	9.00
Trucking	1,442.14
Maintenance Repairs and Alterations	12,322.99
Power, Heat and Light (Purchased)	5,086.86
Superintendent and Factory Office	10,072.66
Miscellaneous Manufacturing Expense	3,871.07
Repair Department	21,223.67
Total as per Books	$131,750.85
Add—Difference between total as shown by the books and as reported by Marwick, Mitchell & Co.	197.50
Total	$131,948.35
Ratio to Material and Productive Labor Combined	*80.17*
Deduct—Items improperly included therein—	
Expense of Refinishing Second-Hand and Used Scales	*21,223.67*
Difference between total as shown by the books and as reported by Marwick, Mitchell & Co.	*197.50*
Add—Items omitted—	
Insurance Premiums transferred from Commercial and Selling Expenses	2,634.09
Net Balance	$113,161.27
Ratio to Material and Productive Labor Combined	*68.76*

DEF. EX. 61

TOLEDO SCALE COMPANY

STATEMENT OF PROFITS BY YEARS
FROM JANUARY 1 1906 TO AUGUST 31 1912
DIVIDED AS BETWEEN CYLINDER AND FAN SCALE BUSINESS

Price, Waterhouse & Co.
134 South La Salle Street
Chicago

TOLEDO SCALE COMPANY

STATEMENT OF PROFITS BY YEARS FROM JANUARY 1 1906 TO AUGUST 31 1912 DIVIDED AS BETWEEN CYLINDER AND FAN SCALE BUSINESS AND EXCLUSIVE OF PROFITS FROM CANADIAN AND VULCANIZER BUSINESS

First: Statement of profits before deducting Losses on Agents' and Customers' Accounts and Interest on Investment

Year	Net Sales exclusive of 2nd Hand		Total Net Profits as per Books (as above)		Division as between Cylinder and Fan Business								*Difference being *over-statement* or under-statement of Cylinder Profits by M. M. P. & Co. as compared with P. W. & Co.'s computation
					As Computed by M. M. P. & Co. (*Red* figures denote *Losses*)				As Computed by P. W. & Co.				
					To Cylinder		To Fan		To Cylinder		To Fan		
	Cylinder	Fan	Amount	%	Amount	%	Amount	%	Amount	%	Amount	%	
1905 prior to introduction of Cylinder business	$	$ 466,264.13	$ 65,724.57	*14.30*	$		$ 65,724.57	*14.30*	$		$ 65,724.57	*14.30*	$
1906	5,544.00	482,065.76	48,788.03	*10.00*	722.28	*15.02*	48,065.75	*9.97*	851.79	*15.36*	47,936.24	*9.94*	129.51
1907	147,836.00	420,842.84	52,894.99	*9.30*	28,452.61	*19.24*	24,442.38	*5.81*	21,520.21	*14.55*	31,374.78	*7.46*	*6,932.40*
1908	437,076.75	409,001.14	80,569.48	*9.52*	72,294.41	*16.54*	8,275.07	*2.02*	51,439.79	*11.76*	29,129.69	*7.12*	*20,854.62*
1909	556,108.08	583,572.67	170,258.93	*14.93*	118,453.39	*21.30*	51,805.54	*8.88*	94,820.26	*17.05*	75,438.67	*12.93*	*23,633.13*
1910	722,625.76	492,704.53	115,088.14	*9.46*	129,816.85	*17.96*	*14,728.71*	2.99	87,643.83	*12.12*	27,444.31	*5.57*	*42,175.02*
1911	711,178.84	461,576.62	41,110.98	*3.51*	120,117.00	*16.89*	*79,006.02*	17.12	37,812.43	*5.32*	3,298.55	*.72*	*82,304.57*
1912 (8 Months)	469,031.71	329,244.01	68,395.42	*8.55*	93,183.70	*19.86*	*24,788.28*	7.53	48,815.68	*10.40*	19,579.74	*5.95*	*44,368.02*
Totals	$3,049,401.14	$3,179,007.57	$ 577,105.97	*9.26*	$563,040.24	*18.46*	$14,065.73	.44	$342,903.99	*11.24*	$234,201.98	*7.36*	*$220,136.25*

*The Fan Scale Profits are correspondingly *under stated* except in the year 1906 when they were over stated.

Second: Division of Profits as computed by Price, Waterhouse & Company and relative deductions for Losses on Agents' and Customers' Accounts and Interest on Investment.

Year	Division of Profits as above as computed by P. W. & Co.		Deductions from Profits				Net Profits or *Losses*	
			Losses on Agents' and Customers' Accounts 3% of Gross Sales		Interest on Investment			
	Cylinder	Fan	Cylinder	Fan	Cylinder	Fan	Cylinder	Fan
1906	$ 851.79	$ 47,936.24	$ 172.80	$ 15,627.75	$ 198.00	$ 17,904.00	$ 480.99	$ 14,404.49
1907	21,520.21	31,374.78	4,654.16	13,721.82	5,353.81	15,807.19	11,512.24	1,845.77
1908	51,439.79	29,129.69	14,243.59	13,517.37	14,024.88	13,566.12	23,171.32	2,046.20
1909	94,820.26	75,438.67	19,181.79	18,896.95	15,734.89	15,995.11	59,903.58	40,546.61
1910	87,643.83	27,444.31	25,844.07	16,308.67	28,556.71	18,943.29	33,243.05	*7,807.65*
1911	37,812.43	3,298.55	26,621.24	16,294.54	30,349.50	19,650.50	*19,158.31*	*32,646.49*
1912 (8 Months)	48,815.68	19,579.74	17,706.70	11,229.24	19,792.96	13,540.38	11,316.02	*5,189.88*
Totals	$342,903.99	$234,201.98	$108,424.35	$105,596.34	$114,010.75	$115,406.59	$120,468.89	$ 13,199.05

DEFS. EX. 28
Offered but not admitted
Sheet 1

DESCRIPTION				413 Price per 100	414 Price per 100	415 Price per 100
29 882 404						
Pan — Platter — Scoop	1			31.95	18.00	171.47
90 991 992						
Pan — Platter — Scoop Spider	1		Gold	33.03½	52.54½	33.90
Shot Box Weights				.25		
Spider Agate Caps	2	4	Gold	5.21		
/4" x 8/32 R. H. Brass Mach. Screws	4	R610	"	.67		
Lever	1	96-97	"	86.29½	88.28½	86.29½
Base Agate Caps	2	5	"	5.19		
/4" x 8/32 R. H. Brass Mach. Screws	4	R610	"	.67		
Lever Pivot Thrusts	4	941	Semi	.58		
Connecting Link	1	715	"	.87½		
" " Pin	2	88	"	.14		
" " " ret. Clips	2	89	"	.47		
Base Lug	1	124	"	1.42		
" " Adjusting Screws	2	366	"	.25½		
/8" x 12/24 R. H. Iron Mach. Screw	1	R676	"	.17½		
Lever Dust Shield	1	30	Gold	3.02½		
/4" x 8/32 R. H. Brass Mach. Screws	2	R610	"	.33½		
Clevis Bushing	1	557		.54½		
Base	1	560	Gold	93.49		
Patent Plate	1	914	"	2.05		
/16" x 4/36 R. H. Iron Mach. Screw	2	R697	"	.17½		
Dash Pot Assemb. Comp.	1	740		17.46		
/4" x 8/32 R. H. Iron Mach. Screws	2	R698	Semi	.20½		
Clevis Pin Assemb.	1	711	Gold	.27½		
Leveling Screw	1	566	"	3.81½		
" " Lock Nut	1	663	Semi	.12		
" " Washer	1	564	Gold	.05½		
" Bar	1	598	Semi	1.82		
" " Retainers	2	664	"	.16½		
/4" x 8/32 R. H. Iron Mach. Screw	2	R698	"	.20½		
Sub-base	1	562	Gold	24.28½		
" " feet	4	63		3.80		
1/2" x 14/20 R. H. Iron Mach. Screw	1	R700	Semi	.60		
/4" x 3/4" Iron Washers	1	R430	"	.05½		
Housing	1	2594	Gold	134.13½		
/8" x 12/24 R. H. Iron Mach. Screws	4	R676	Semi	.34½		
/4" x 3/4 Iron Washers	4	R430	"	.21½		
Dowel Pins	2	423	"	.11		
Carried Forward				454.46½	462.01	594.94½

Name 413 "A" Scale "Gold" Jun 10 1913

Defendant's Exhibit No. 28. 2041

DEFS. EX. 28
Offered but not admitted
Sheet 2

DESCRIPTION				413 Price per 100	414 Price per 100	415 Price per 100
Brought Forward				454.46¼	462.01	594.94½
Lower Housing Scroll with Hood	1	2822	Gold	8.46		
" " " Thumb Screws	2	661	"	.87		
" " " without Hood	1	2152	"	5.75¼		
5/16" x 8/32 R. H. Brass Mach. Screws	2	R622	"	.36		
Lower Housing Glass	2	2784		13.00		
Glass Retaining Clips	5	2788	Gold	.38¾		
1/8" x 2/56 R. H. Brass Mach. Screws	5	R620	"	.53		
Housing Opening Cover	1	699	"	4.97½		
1/4" x 8/32 R. H. Brass Mach. Screw	1	R610	"	.16¼		
Back Housing Shield	1	2503	"	5.23¼		
1/4" x 8/32 R. H. Brass Mach. Screw	2	R610	"	.33½		
Front Housing Shield	1	2525	"	5.38		
1/2" x 8/32 R. H. Iron Mach. Screw	2	R687	"	.50½		
Pendulum Operating Knob	1	8		3.70½		
" " " Set Screw	1	2534	Gold	.09¾		
Front Housing Scroll	1	1637	"	10.14½		
5/16" x 8/32 R. H. Brass Mach. Screws	4	R622	"	.72		
Front Housing Glass	1	749		3.61¾		
Back Housing Scroll	1	1483	Gold	8.60½		
5/16" x 8/32 R. H. Brass Mach. Screws	3	R622	"	.54		
Back Housing Glass	1	751		1.60		
Chart Glass Felts	6	1009		.06		
Housing Opening Plate	1	2512	Gold	5.81¾		
Flash Opening Scroll	1	430	"	2.15½		
1/4" x 8/32 R. H. Brass Mach. Screw	2	R610	"	.33½		
Flash Opening Glass	1	753		.20		
Glass Retaining Clips	2	2788	Gold	.31		
1/4" x 2/56 F. H. Iron Mach. Screw	2	R670	Semi	.06½		
Housing Protector Plate	1	2841	Gold	1.99		
" " " ret. Screws	2	484	"	.24		
Chart	1	110		41.00		
Large Chart Screws	2	24	Gold	.58½		
Small " "	5	484	"	.60		
Split Washers	5	330	Semi	.23½		
Upper Pendulum Bumper	1	78		.33½		
Carried Forward				582.80	500.34¼	723.28

Name 413 "A" Scale "Gold" Jun 10 1913

DEFS. EX. 28
Offered but not admitted
Sheet 3

DESCRIPTION				413 Price per 100	414 Price per 100	415 Price per 100
Brought Forward				582.80	590.34½	723.28
Race Plate	2	2608	Gold	8.54½		
" Locating Pin & Screw Assemb.	2	2564		.92		
" " Screws	2	2562		.45½		
" Spacing Tube	1	2565		.64½		
" " " & Lower Pend. Bumper	1	2638		1.93½		
Pendulum Pivot Retainer	1	2514	Semi	1.12½		
" " " Screw	1	2568	Gold	.16½		
" " " Pin	1	2589	Semi	.04		
" Thrust Plate Assemb.	1	2571		1.09½		
3/8" x 8/32 R. H. Irom Mach. Screw	2	R680	Semi	.22½		
Flash Sign Assemb. & Printed	1	2748		4.12½		
" " Shoulder Screw	1	429	Semi	.23½		
Carrier Arm Assemb. Complete	1	2605		29.67½		
" " Extension	1	582	Nickle	2.19		
1/4" x 8/32 R. H. Irom Mach. Screw	1	R698	"	.11		
Carrier Arm Stud Platte Screw	3	993	"	.40½		
Pendulum Assemb. Complete	1	2747	Gold	70.89½		
Hook & Plate Assemb.	1	1008		5.68		
Hook Spacing Collar	1	374		.19½		
Clevis Pin	1	54		.03		
Ft. & Bk. Hand Assemb.	1	2737		19.68½		
Clevis Pins	2	54		.06		
3/8" x 8/32 R. H. Irom Mach. Screws	2	R680	Semi	.22½		
Hand Washer	1	2646		.11½		
Shipping Pin—Long	1	596		1.21½		
" " Washer	1	1139		.02½		
Cotter Pin	1	512		.02½		
Shipping Pin—Short	1	360		.28½		
Shipping Tag	1	Form 80		.06		
Workmans Slip	1	" 19		.19½		
Inspection Sheet	1	" 32		.19		
Chart Protector	1	13116		.35½		
4 Gal. Dash Pot Oil				.16		
Carried Forward				734.07½	741.62	874.55½

Name 413 "A" Scale "Gold" Jun 10 1913

Defendant's Exhibit No. 28. 2043

DEFS. EX. 28
Offered but not admitted
Sheet 4

DESCRIPTION			413 Price per 100	414 Price per 100	415 Price per 100
Brought Forward			734.07½	741.62	874.55½
19—Assemble			12.00		
21—Fitting Automatic Flash Arms			8.00		
22— " race & operating knob			14.00		
18—Clean dash pot			1.40		
24—Line hands			16.00		
37—Scrolling			14.00		
25—Balancing			30.00		
16—Wash & clean			4.50		
First Inspection			20.00		
Final "			10.00		
Scale Inspected			863.97½	871.52	1004.45½
Reflector Assemb. Complete	1	603	32.59½		
Scale with Reflector			896.56½	904.11½	1037.04½

Name 413 "A" Scale "Gold" Jun 10 1913

DEFS. EX 29.
Offered but not admitted
Sheet 1

DESCRIPTION				453 Price per 100	454 Price per 100	455 Price per 100
91 266 2843						
Pan — Platter — Scoop	1			68.07½	60.00	181.88½
1015 138 987						
Pan — Platter — Scoop Spider	1		Gold	48.05	49.71	42.39
Shot Box Weights	3	310		4.89½		
Spider Agate Caps	2	4	Gold	5.21		
1/4 x 8/32 R. H. Brass Mach. Screws	4	R610	"	.67		
Lever & Tare Beam Assemb.	1	25–258	"	171.30½	177.31½	171.30½
Base Agate Caps	2	5	"	5.19		
1/4" x 8/32 R. H. Brass Mach. Screws	4	R610	"	.67		
Lever Pivot Thrusts	4	941	Semi	.58		
Connecting Link	1	715	"	.87½		
" " Pins	2	88	"	.14		
" " " ret. Clips	2	89	"	.47		
Base Lug	1	124	"	1.42		
" " Adjusting Screws	2	366	"	.25½		
5/8 x 12/24 R. H. Iron Mach. Screw	1	R676	"	.17½		
Lever Dust Shield	1	35	Gold	3.18½		
1/4" x 8/32 R. H. Brass Mach. Screws	2	R610	"	.33½		
Base	1	479	"	133.53½		
Patent Plate	1	914	"	2.05		
3/16" x 4/36 R. H. Iron Mach. Screws	2	R697	"	.17½		
Dash Pot Assemb.	1	740		17.46		
1/4" x 8/32 R. H. Iron Mach. Screw	2	R698	Semi	.20½		
Leveling Screw	1	2596	Gold	3.37½		
" " Washer	1	564	"	.05½		
" " Lock Nut	1	663	Semi	.12		
" Bar	1	481	"	2.70½		
" " Retainers	2	664	"	.16½		
1/4" x 8/32 R. H. Iron Mach. Screw	2	R698	"	.20½		
Sub-base	1	480	Gold	32.30½		
Sub-base feet	4	63		3.80		
1 1/2" x 14/20 R. H. Iron Mach. Screw	1	R700	Semi	.60		
Housing	1	2501	Gold	180.06½		
5/8" x 12/24 R. H. Iron Mach. Screw	4	R676	Semi	.34½		
1/4" x 3/4" Iron Washer	4	R430	"	.21½		
Dowel Pins	2	423	"	.11		
Lower Housing Scroll with Hood	1	2779	Gold	7.68½		
" " " Thumb Screws	2	661	"	.87		
Carried Forward				607.54½	607.13½	805.69½

Name 453 "A" Scale "Gold" Jun 10 1913

Defendant's Exhibit No. 29. 2045

DEFS. EX. 29,
Offered but not admitted
Sheet 2

DESCRIPTION				453 Price per 100	454 Price per 100	455 Price per 100
Brought Forward				697.54½	697.13½	805.69½
Lower Housing Scroll without Hood	1	2726	Gold	5.98½		
3/8" x 8/32 R. H. Brass Mach. Screws	2	R605	"	.38½		
Lower Housing Glass	2	2727		13.00		
Glass Retaining Clips	4	2788	Gold	.31		
1/8" x 2/56 R. H. Brass Mach. Screws	4	R620	"	.42½		
Housing Opening Cover	1	2560	"	4.80		
1/4" x 8/32 R. H. Brass Mach. Screw	1	R610	"	.16½		
Back Housing Shield	1	2503	"	5.23½		
1/4" x 8/32 R. H. Brass Mach. Screw	2	R610	"	.33½		
Front Housing Shield	1	2525	"	5.38		
1/2" x 8/32 R. H. Iron Mach. Screw	2	R687	"	.50½		
Pendulum Operating Knob	1	8		3.70½		
" " " Set Screw	1	2534	Gold	.09½		
Front Housing Scroll	1	1635	"	14.20½		
5/16" x 8/32 R. H. Brass Mach. Screws	4	R622	"	.72		
Front Housing Glass	1	918		6.53½		
Back Housing Scroll	1	259	Gold	10.25½		
5/16" x 8/32 R. H. Brass Mach. Screws	4	R622	"	.72		
Back Housing Glass	1	919		2.12		
Chart Glass Felts	8	1009		.08		
Housing Opening Plate	1	2515	Gold	7.18½		
Flash Opening Scroll	1	430	"	2.15½		
1/4" x 8/32 R. H. Brass Mach. Screws	2	R610	"	.33½		
Flash Opening Glass	1	753		.20		
Glass Retaining Clips	2	2788	Gold	.31		
1/4" x 2/56 F. H. Iron Mach. Screw	2	R670	Semi	.06½		
Chart	1	143		38.00		
Small Chart Screws	4	484	Gold	.48		
Split Washers	4	330	Semi	.18½		
Large Chart Screws	2	24	Gold	.58½		
Upper Pendulum Bumper	1	78		.33½		
Race Plate	2	2561	Gold	9.60		
" Locating Pin & Screw Assemb.	2	2564		.92		
" Plate Locating Screw	2	2562		.45½		
" Spacing Tube	1	2565		.64½		
" " " & Lower Pend. Bumper	1	2567		1.52		
Carried Forward				835.48½	835.07½	943.63½

Name 453 "A" Scale "Gold" Jun 10 1913

DEFS. EX. 29,
Offered but not admitted
Sheet 3

DESCRIPTION				453 Price per 100	454 Price per 100	455 Price per 100
Brought Forward				835.48½	835.07½	943.63½
Pendulum Pivot Retainer Screw	1	2514	Semi	1.12½		
" " " Screw	1	2568	Gold	.16½		
" " " Pin	1	2589	Semi	.04		
" Thrust Plate Assemb.	1	2571		1.09½		
3/8" x 8/32 R. H. Iron Mach. Screws	2	R680	Semi	.22½		
Flash Sign Assemb. & Printed	1	2588		4.32½		
" " Shoulder Screw	1	429		.23½		
Carrier Arm Assemb. Complete	1	2556		28.79½		
" " Extension	1	2531		2.19½		
1/4" x 8/32 R. H. Iron Mach. Screw	1	R698	Nickle	.11		
Carrier Arm Stud Plate Retaining Screws	3	993		.40½		
Pendulum Assemb. Complete	1	2612		72.83		
Hook & Plate Assemb.	1	1007	Gold	5.97		
" Spacing Collar	1	374		.19½		
Clevis Pin	1	54		.03		
Ft. & Bk. Hand Assemb.	1	2586		20.51½		
Clevis Pins	2	54		.06		
3/8" x 8/32 R. H. Iron Mach. Screws	2	R680	Semi	.22½		
Hand Washer	1	2646		.11½		
Clevis Bushing	1	557		.54½		
" Pin Assemb.	1	711	Gold	.27½		
Shipping Pin — Long	1	596		1.21½		
" " Washer	1	1139		.02 3/8		
Cotter Pin	1	512		.02 1/8		
Shipping Pin — Short	1	360		.28½		
Shipping Tag	1	Form 80		.06		
Workmans Slip	1	" 19		.19½		
Inspection Sheet	1	" 32		.19		
Chart Protector	1	13116		.35½		
.4 Gal. Dash Pot Oil				.16		
Carried Forward				977.44½	977.03½	1085.59½

Name 453 "A" Scale "Gold" Jun 10 1913

DEFS. EX. 29,
Offered but not admitted
Sheet 4

DESCRIPTION			453 Price per 100	454 Price per 100	455 Price per 100
Brought Forward			977.44½	977.03½	1085.59½
19 — Assemble			12.00		
21 — Fitting Automatic Flash Arms			8.00		
22 — " race & operating knob			14.00		
18 — Clean dash pot			1.40		
24 — Line hands			16.00		
37 — Scrolling			14.00		
25 — Balancing			30.00		
16 — Wash & clean			4.50		
First Inspection			20.00		
Final "			10.00		
Scale Inspected			1107.34½	1106.93½	1215.49½
18 B. C. Wrapping Twine			.09		
6 Ply Jute Twine			.02		
Tacks			.02½		
36 x 48 Wrapping Paper			.38¼		
30 x 40 "			.64	.48	.64
Direction Book	1	Form 83	1.50		
Window Card	1		1.82½		
Poise Strip	1	165	.11½		
End Shift Blocks		13001	.12	.36	.36
5D Coated Wire Nails to retain 13001			.01½	.04½	.04½
Platter Rack Assemb.	1		00	2.28 1/8	00
7D Coated Wire Nails			00	.05½	00
2 1/2" — 14 Drive Screws	6	R662	.87		
Shipping Crate Assemb.			58.10½		
4 Hole Board	1	13010	.54		
2 3/4 — 14 Iron Wood Screws	4	R664	.70		
3/8" x 7/8" Iron Washer	4		.25		
Packing Scale			7.50		
Scale Packed for Shipment			1180.04	1181.95½	1288.45½

Name 453 "A" Scale "Gold" Jun 10 1913

DEFS. EX. 30
Offered but not admitted
Sheet 1

DESCRIPTION				403 Price per 100	404 Price per 100	405 Price per 100
		2104	Gold			
		2019				
Pan — Platter Scoop	1	2140	Gold	27.29½	14.00	103.79½
2123 2124 2089						
" " " Spider	1		Gold	3.23½	3.23½	5.87½
Spider Retaining Screws	2	R697	"	.18½		
Plunger Regulating Cap	1	2062		5.20½		
Patent Plate	1	2111	Gold	1.43		
" " retaining screws	2	R697	"	.18½		
Housing Opening Plate	1	2072	Gold	9.12½		
" " " retaining screws	2	R705	"	.19½		
Front Housing Scroll	1	2067	"	10.35		
" " " retaining screws	4	R705	"	.39		
" " Glass	1	2069		2.75		
Back Housing Scroll	1	2068	Gold	6.55		
" " " retaining screws	3	R697	"	.27½		
" " Glass	1	2070		1.50		
Shift Opening Cover	1	2148	Gold	1.93½		
" " " retaining screws	2	484	"	.34		
"A" Pendulum Assb. Complete	1	2101		35.51½		
False Bottom	1	2074		2.07		
" " retaining screw	1	R698	Semi	.10		
Pendulum Bumper Assb.	1	2103		.64		
" " retaining screws	2	R697	Semi	.17		
Chart	1	107		38.02		
" screws	4	484	Gold	.68		
" " counterbalance washers	2	330	"	.09½		
Housing Agate Bridge Assb.	1	2093		12.17½		
" " " retaining screws	2	R683	Semi	.22		
Check Riser Assb.	1	2105		4.23½		
" " retaining screws	1	R680	Semi	.11		
Connecting Link Pin	1	2113		.13½		
Shift Lug	1	2154		.92½		
" " Screw	1	2020		.11½		
" " Adj. Screw	2	R711	Semi	.20		
Leveling Screw Assb.	1	2090		2.89		
" " Washers	1	564		.05½		
" " Feet	1	2109		.38½		
" " " Rubber	1			.04		
Base	1	2000	Gold	52.26½		
Housing	1	2114	"	74.67½		
Base to housing screws	3	R680	Semi	.33		
Carried Forward				296.99	283.69½	376.12½

Name 403 — 404 — 405 "A" Scale "Gold"

Defendant's Exhibit No. 30. 2049

DEFS. EX. 30
Offered but not admitted
Sheet 2

DESCRIPTION				403 Price per 100	404 Price per 100	405 Price per 100
Brought Forward				296.99	283.69¼	376.12¼
Base Plate Assb.	1	2126		100.98¼		
" " retaining screws	4	R698		.40		
.31 Gal. Dash Pot Oil				.12½		
Workmans Slip	1	Form 19		.19½		
Shipping Tag	1	" 80		.06		
25 yards Cheese Cloth				.72		
Assemble Complete				26.00		
Wash & Clean				1.50		
Final Inspection				7.50		
Scale Inspected				434.47½	421.18¼	513.61¼
Reflector Assb.	1	2022	Gold	30.09½		
" retaining screw	1	R682	"	.12½		
Scale with reflector				465.69¼	451.40	543.83
Scale with reflector packed for shipment				498.32	485.02¼	577.45¼
" " " & 3" stand	"	"	"	542.46¼	529.17	621.60
" " " & 5" "	"	"	"	543.59¼	530.30½	622.73½

Name 403 — 404 — 405 "A" Scale "Gold"

DEFS. EX. 30
Offered but not admitted
Sheet 3

DESCRIPTION				403 Price per 100	404 Price per 100	405 Price per 100
2104 2019 2140 Pan — Platter — Scoop	1		Gold	27.29½	14.00	103.79½
2123 2124 2089 Pan — Platter — Scoop Spider Assb.	1		"	3.23½	3.23½	5.87½
Spider Retaining Screws	2	R697	"	.18½		
Base	1	2000	"	52.26½		
Housing	1	2114	"	74.67½		
" to base retaining screws	3	R680	Semi	.33		
Plunger Regulating Cap	1	2062	Gold	5.20½		
Patent Plate	1	2111	"	1.43		
" " retaining screws	2	R697	"	.18½		
Housing Opening Plate	1	2072	"	9.12½		
" " " retaining screws	2	R705	"	.19½		
Front Housing Scroll	1	2067	"	10.35		
" " " retaining screws	4	R705	"	.39		
" " Glass	1	2069		2.75		
Back Housing Scroll	1	2068	Gold	6.55		
" " " retaining screws	3	R697	"	.27½		
" " Glass	1	2070		1.50		
Shift Opening Cover	1	2148	Gold	1.93½		
" " " retaining screws	2	484	"	.34		
Pendulum Assb. Complete	1	2118				
False Bottom	1	2074	Semi	2.07		
" " retaining screws	1	R698	Semi	.10		
Pendulum Bumper Assb.	1	2103		.64		
" " retaining screws	2	R697	Semi	.17		
Chart "B"	1	104		26.62		
Chart Screws	4	484	Gold	.68		
" " Counterbalance Washers	2	330		.09½		
Housing Agate Bridge Assb.	1	2093		12.17½		
" " " retaining screws	2	R683	Semi	.22		
Check Riser Assb.	1	2105		4.23½		
" " retaining screws	1	R680	Semi	.11		
Connecting Link Pin	1	2113		.13½		
Shift Lug	1	2154		.92½		
" " Screw	1	2020		.11½		
" " Adjusting Screw	2	R711	Semi	.20		
Leveling Screw Assb.	1	2090		2.89		
" " Washers	1	564		.05½		
" " Feet	1	2109		.38½		
Carried Forward				286.34½	273.05½	365.48½

Name 403 — 404 — 405 "B" Scale "Gold"

Defendant's Exhibit No. 30. 2051

DEFS. EX. 30
Offered but not admitted
Sheet 4

DESCRIPTION				403 Price per 100	404 Price per 100	405 Price per 100
Brought Forward				286.34½	273.05½	365.48½
Leveling Screw Foot Rubber	1			.04		
Base Plate Assembled	1	2126		100-98½		
" " retaining screws	4	R698	Semi	.40		
.31 Gal Dash Pot Oil				.12½		
Workmans Slip	1	Form 19		.19½		
Shipping Tag	1	" 80		.06		
25 yds. Cheese Cloth				.72		
Assemble Complete				26.00		
Wash & Clean				1.50		
Final Inspection				7.50		
Scale Inspected				423.87½	410.58	503.01
Reflector Assb.	1	2022	Gold	30.09½		
" retaining screw	1	R682	"	.12½		
Scale with reflector				454.09	440.79½	533.22½
Scale with reflector packed for shipment				487.71½	474.42½	566.85½
" " " & 3' stand packed for shipment				530.86½	517.57½	610.99½
" " " & 5' " " " "				532.06½	518.77	612.19½

Name 403 — 404 — 405 "B" Scale "Gold"

DEFS. EX. 31
Offered but not admitted
Sheet 1

DESCRIPTION		Part Number	Color	620 Price per 100	621 Price per 100	622 Price per 100
#233 #234 #659						
Pan—Platter—Scoop	1		Gold	39.41½	60.00	110.78½
Housing	1	2792	"	127.33½		
Base & Base Horn Assb.	1	415	"	106.31½		
5/8" x 12/24 R. H. Iron Machine Screw	4	R676	Semi	.69		
1/4" x 3/4" O. D. Iron Washers	4	R430	"	.21½		
1016 #988 #989						
Pan—Platter—Scoop Spider	1		Gold	36.34½	58.49½	37.42½
Lever & Tare Beam Assembled	1	255-22	"	127.58½	130.55½	127.58½
Pendulum Assb. Complete	1	597	"	33.89½		
Plunger Assb. Complete	1	326	"	9.53½		
Dash Pot Cap Washer	1	105	Semi	.25		
Pendulum Pivot Thrust Assb.	2	344	"	1.24		
Pendulum Pivot Thrust Ret. Screws	4	R698	"	.40½		
Chart	1	1559		26.40		
Small Chart Screws	3	484	Gold	.36		
Spider Agate Caps	2	4	"	5.21		
" " " Ret. Screws	4	R698	"	.40½		
Base Agate Caps	2	5	"	5.19		
" " " Ret. Screws	4	R698	"	.40½		
Lever Pivot Thrust	4	941	Semi	.58		
Pendulum Shot Box Lead				.67½		
" " " Screw	1	184	Nickle White	.27½		
" Hook & Plate Assb.	1	1008	Gold	5.68		
Hook Spacing Collar	1	374	Semi	.19½		
Clevis Pin	2	54	"	.06		
Forked Indicator Sprayed	1	948	Sprayed	3.09½		
Hand Washer	1	155	Semi	.10		
" " ret. Screws	2	R698	"	.20½		
Price Ind. Thrust Plate Rivet	2	2636	"	.04½		
Connecting Link Pro. Cap	1	230	Gold	3.39		
" " " " Ret. Screw	1	R679	Semi	.15½		
" " Pin Ret. Clip	2	89	"	.47		
" " "	2	88	"	.14		
Connecting Link	1	715	"	.87½		
Leveling Leg	1	976	Gold	6.91		
Leveling Bar Retainers	2	664	Semi	.16½		
" " Retainer Screw	2	R698	"	.20½		
Stand Leg	2	965	Gold	11.56		
" " ret. screws	2	R676	Semi	.34½		
" " " " washers	2	R430	"	.10½		
Carried Forward				556.41½	602.12	628.86½

Name 620—621—622 Scale "Gold"

Oct. 10 1913

Defendant's Exhibit No. 31. 2053

DEFS. EX. 31
Offered but not admitted
Sheet 2.

DESCRIPTION				620 Price per 100	621 Price per 100	622 Price per100
Brought Forward				556.41½	602.12	628.86½
Housing Locating Dowel Pin	2	423	Semi	.11		
Leveling Screw	1	974	Gold	2.21½		
" " Lock Nut	1	663	Semi	.12		
" " Wrench	1	714	"	.56		
" Foot Coil	1	390	"	.38½		
Shift Post	1	442	Zinc	1.78		
" " Washer	2	1208	Gold	.51½		
" " Locking Pin	1	1640	Semi	.04½		
" " Adjusting Nut	1	726	Gold	1.60		
" " Locking "	1	727	"	1.95½		
Housing Opening Cover	1	699	"	4.97½		
" " " Ret. Screws	1	R698	"	.10½		
Spider Shot Box Weight	1	309	Semi	1.72½		
" " " Lead				.91		
Ft. & Bk. Housing Scrolls	2	1482	Gold	22.33		
" " " " Glass	2	749		7.23½		
Chart Glass Felt	15			.15		
Front Housing Scroll Ret. Screws	4	R622	Gold	.72		
Back " " " "	4	R622	"	.72		
Lower Housing Scroll	2	787	"	13.65		
" " Glass	2	788		1.95½		
" " " Ret. Clip	4	2788	Semi	.31		
Back Lower Housing Scroll Ret. Screws	2	R605	Gold	.38½		
Front " " " Thumb "	2	661	"	.87		
Lower Housing Glass Pet. Clip Ret. "	4	R620	"	.42½		
Lever Dust Shield	1	30	"	3.02½		
" " " Ret. Screws	2	R698	"	.21		
Housing Agate Cover	2	454	"	6.18½		
" " " Ret. Screws	4	R610	"	.67		
Dash Pot Oil	.4	Gal at .40		.16		
Reflector Hole Screw	1	R613	Gold	.44½		
Patent Plate	1	914	"	2.05		
" " Ret. Screws	2	R697	"	.17½		
Upper Pendulum Bumper	1	78	Semi	.33½		
Lower " "	1	76	"	.39½		
Lever Shipping Pin (Short)	1	360	"	.28½		
" " " (Long)	1	417	"	1.18½		
Housing Protector Plate	1	2841	Gold	2.05½		
Carried Forward				639.33½	685.03½	711.78

Name 620—621—622 Scale "Gold"

Oct 10 1912

DEFS. EX. 31
Offered but not admitted
Sheet 3

				620	621	622
				Price per 100	Price per 100	Price per 100
Brought Forward				639.33½	685.03½	711.78
Small Chart Screws	2	484	Gold	.24		
Sealing Pin Long	2	713	Semi	2.48½		
Chart Protector	1	13116	"	.35½		
Shipping Pin Washer	1	1139	"	.02½		
" " Ret. Cotter Pin	1	512		.02½		
Shipping Tag	1	Form 80		.06		
Workmans Slip	1	" 19		.19½		
Leveling Screw Wrench Envelope	1	" 68		.21½		
Inspection Sheet	1	" 32		.19		
#18—Clean Dash pots				1.40		
19—Assemble Scale				8.00		
23—Line Hand & Chart				12.00		
30—Balance Scale				26.00		
37—Scrolling Scale				14.00		
16—Wash & Clean Scale				1.50		
First Inspection				16.00		
Final Inspection				8.00		
Scale Inspected				733.01½	778.71½	805.46½
Reflector Assb. Complete	1	603	Gold	34.64½		
Scale with Reflector				767.65½	813.36	840.10½

Name 620—621—622 Scale "Gold" Oct 10 1913

Defendant's Exhibit No. 32. 2055

DEFS. EX. 32
Offered but not admitted
Sheet 1

DESCRIPTION				423 Price per 100	424 Price per 100	425 Price per 100
233 234 235						
Pan — Platter — Scoop	1					
1016 988 989				39.41½	60.00	110.22½
Pan — Platter — Scoop Spider	1		Gold	36.34½	58.49½	37.42½
Shot Box Weights				.25		
Spider Agate Caps	2	4	Gold	5.21		
1/4 x 8/32 R. H. Brass Mach. Screws	4	R610	"	.67		
Lever & Tare Beam Assemb.	1	255–22	"	127.58½	130.55½	127.58½
Base Agate Caps	2	5	"	5.19		
1/4 x 8/32 R. H. Brass Mach. Screws	4	R610	"	.67		
Lever Pivot Thrusts	4	941	Semi	.58		
Connecting Link	1	715	"	.87½		
" " Pins	2	88	"	.14		
" " " ret. Clips	2	89	"	.47		
Base Lug	1	124	"	1.42		
" " Adjusting screws	2	366	"	.25½		
5/8 x 12/24 R. H. Iron Mach. Screw	1	R676	"	.17½		
Lever Dust Shield	1	30	Gold	3.03½		
1/4" x 8/32 R. H. Brass Mach. Screws	2	R610	"	.33½		
Base	1	2504	"	99.12½		
Patent Plate	1	914	"	2.05		
3/16" x 4/36 R. H. Iron Mach. Screws	2	R697	"	.17½		
Dash Pot Assemb.	1	2623		17.46		
1/4 x 8/32 R. H. Iron Mach. Screws	2	R698	Semi	.20½		
Leveling Screw	1	566	Gold	3.81½		
" " Washer	1	564	"	.05½		
" " Lock Nut	1	663	Semi	.12		
" Bar	1	591	"	2.03½		
" " Retainers	2	664	"	.16½		
1/4" x 8/32 R. H. Iron Mach. Screws	2	R698	"	.20½		
Sub-base	1	561	Gold	28.37		
" " feet	4	63		3.80		
11/2" x 14/20 R. H. Iron Mach. Screw	1	R700	Semi	.60		
Housing	1	2502	Gold	145.72½		
5/8" x 12/24 R. H. Iron Mach. Screw	4	R676	Semi	.34½		
1/4" x 3/4 Iron Washer	4	R430	"	.21½		
Dowel Pins	2	423	"	.11		
Lower Housing Scroll with Hood	1	2821	Gold	8.07½		
" " " Thumb Screws	2	661	"	.87		
Carried Forward				536.12½	581.83	608.01½

Name 423 "A" Scale "Gold"

Jun 16 1913

DEFS. EX. 32
Offered but not admitted
Sheet 2

DESCRIPTION				423 Price per 100	424 Price per 100	425 Price per 100
Brought Forward				536.12½	581.83	608.01½
Lower Housing Scroll without Hood	1	2726	Gold	5.98½		
3/8" x 8/32 R. H. Brass Mach. Screws	2	R605	"	.38½		
Lower Housing Glass	2	2727		13.00		
Glass Retaining Clips	4	2788	Gold	.31		
1/8" x 2/56 R. H. Brass Mach. Screws	4	R620	"	.42½		
Housing Opening Cover	1	2560	"	4.80		
1/4" x 8/32 R. H. Brass Mach. Screw	1	R610	"	.16½		
Back Housing Shield	1	2503	"	5.23½		
1/4" x 8/32 R. H. Brass Mach. Screw	2	R610	"	.33½		
Front Housing Shield	1	2525	"	5.38		
1/2" x 8/32 R. H. Iron Mach. Screw	2	R687	"	.50½		
Pendulum Operating Knob	1	8		3.70½		
" " " Set Screw	1	2534	Gold	.09½		
Front Housing Scroll	1	2816	"	10.92½		
5/16" x 8/32 R. H. Brass Mach. Screws	4	R622	"	.72		
Front Chart Glass	1	748		4.82½		
Back Housing Scroll	1	408	Gold	10.32		
5/16" x 8/32 R. H. Brass Mach. Screws	3	R622	"	.54		
Back Chart Glass	1	750		2.01½		
Chart Glass Felts	8	1009		.08		
Housing Opening Plate	1	2512	Gold	5.81½		
Flash Opening Scroll	1	430	"	2.15½		
1/4" x 8/32 R. H. Brass Mach. Screws	2	R610	"	.33½		
Flash Opening Glass	1	753		.20		
Glass Retaining Clips	2	2788	Gold	.31		
1/4" x 2/56 F. H. Iron Mach. Screw	2	R670	Semi	.06½		
Chart	1	123		42.00		
Housing Protector Plate	1	2841	Gold	1.99		
" " " ret Screws	2	484	"	.24		
Small Chart Screws	4	484	"	.48		
Split Washers	4	330	Semi	.18½		
Large Chart Screws	2	24	Gold	.58½		
Upper Pendulum Bumper	1	78		.32½		
Race Plate	2	2608	Gold	8.54½		
" Locating Pin & Screw Assemb.	2	2564		.92		
" Plate Locating Screw	2	2562		.45½		
" Spacing Tube	1	2565		.64½		
" " " & Lower Pend. Bumper	1	2638		1.93½		
Carried Forward				673.08	718.78½	744.9

Name 423 "A" Scale "Gold"

June 16 19

Defendant's Exhibit No. 32. 2057

DEFS. EX. 32
Offered but not admitted
Sheet 3

DESCRIPTION				423 Price per 100	424 Price per 100	425 Price per 100
Brought Forward				673.08	718.78½	744.96½
Pendulum Pivot Retainer	1	2514	Semi	1.12½		
" " " Screw	1	2568	Gold	.16½		
" " " Pin	1	2589	Semi	.04		
" Thrust Plate Assemb.	1	2571		1.09½		
3/8" x 8/32 R. H. Iron Mach. Screw	2	R680	Semi	.22½		
Flash Sign Assemb. & Printed	1	2620		4.13½		
" " Shoulder Screw	1	429		.23½		
Carrier Arm Assemb. Complete	1	2605		29.67½		
" " Extension	1	582	Nickle	2.19		
1/4" x 8/32 R. H. Iron Mach. Screw	1	R698	"	.11		
Carrier Arm Stud Plate Screws	3	993		.40½		
Pendulum Assemb. Complete	1	2666		69.66½		
Hook & Plate Assemb.	1	1007	Gold	5.97		
Hook Spacing Collar	1	374		.19½		
Clevis Pin	1	54		.03		
Ft. & Bk. Hand Assemb.	1	2618		19.86½		
Clevis Pins	2	54		.06		
3/8" x 8/32 R. H. Iron Mach. Screw	2	R680	Semi	.22½		
Hand Washer	1	2646		.11½		
Clevis Bushing	1	557		.54½		
" Pin Assemb.	1	711	Gold	.27½		
Shipping Pin—Long	1	596		1.21½		
" Washer	1	1139		.02½		
Cotter Pin	1	512		.02½		
Shipping Pin—Short	1	360		.28½		
" Tag	1	Form 80		.06		
Workmans Slip	1	" 19		.19½		
Inspection Sheet	1	" 32		.19		
Chart Protector	1	13116		.35½		
.4 Gal. Dash Pot Oil				.16		
Carried Forward				811.91½	857.61½	883.80

Name 423 "A" Scale "Gold" June 16 1913

DEFS. EX. 32
Offered but not admitted
Sheet 4

DESCRIPTION			423 Price per 100	424 Price per 100	425 Price per 100
Brought Forward			811.91½	857.61½	883.80
19—Assemble			12.00		
21—Fitting automatic flash arms			8.00		
22— " race & operating knob			14.00		
18—Clean dash pot			1.40		
24—Line hands			16.00		
27—Scrolling			14.00		
25—Balancing			30.00		
16—Wash & Clean			4.50		
First Inspection			20.00		
Final "			10.00		
Scale Inspected			941.81½	987.51½	1013.70
Reflector Assemb. Complete	1	603	32.59½		
Scale with Reflector			974.40½	1020.10½	1046.29½

Name 423 "A" Scale "Gold"

June 16 1913

Defendant's Exhibit No. 33. 2059

DEFS. EX. 33
Offered but not admitted
Sheet 1

DESCRIPTION				503 Price per 100	504 Price per 100	505 Price per 100
		2104	Gold			
		2019				
Pan—Platter—Scoop 2123 2124 2089	1	2140	Gold	27.29½	14.00	103.79½
" " " Spider	1		Gold	3.23½	3.23½	5.87½
Spider Retaining Screws	2	R697	"	.18½		
Plunger Regulating Cap	1	2062		5.20½		
Patent Plate	1	2111	Gold	1.43		
" " retaining screws	2	R697	"	.18½		
Housing Opening Plate	1	2072	Blue	7.07½		
" " " retaining screws	2	R705	Gold	.19½		
Front Housing Scroll	1	2067	"	10.35		
" " " retaining screws	4	R705	"	.39		
" " Glass	1	2069		2.75		
Back Housing Scroll	1	2068		6.55		
" " " retaining screws	3	R697	Gold	.27½		
" " Glass	1	2070		1.50		
Shift Opening Cover	1	2148	Gold	1.93½		
" " " retaining screws	2	484	"	.34		
"A" Pendulum Assb. Complete	1	2101	"	35.51½		
False Bottom	1	2074		2.07		
" " retaining screw	1	R698	Semi	.10		
Pendulum Bumper Assb.	1	2103		.64		
" " retaining screws	2	R697	Semi	.17		
Chart	1	107		38.02		
" Screws	4	484	Gold	.68		
" " Counterbalance Washers	2	330	"	.09½		
Housing Agate Bridge Assb.	1	2093		12.17½		
" " " retaining screws	2	R683	Semi	.22		
Check Riser Assb.	1	2105		4.23½		
" " retaining screws	1	R680	Semi	.11		
Connecting Link Pin	1	2113		.13½		
Shift Lug	1	2154		.92½		
" " Screw	1	2020		.11½		
" " Adj. Screw	2	R711	Semi	.20		
Leveling Screw Assb.	1	2090		2.89		
" " Washers	1	564		.05½		
" " Feet	1	2109		.38½		
" " " Rubber	1			.04		
Base	1	2000	Blue	39.26		
Housing	1	2114	Blue	58.77½		
Base to housing screws	3	R680	Semi	.33		
Carried Forward				266.04	252.74½	345.17½

Name 503—504—505 "A" Scale "Blue"

DEFS. EX. 33.
Offered but not admitted
Sheet 2

DESCRIPTION				503 Price per 100	504 Price per 100	505 Price per 100
Brought Forward				266.04	252.74½	345.17½
Base Plate Assb.	1	2126		100.98½		
" " retaining screws	4	R698	Semi	.40		
.31 Gal. Dash Pot Oil				.12½		
Workmans Slip	1	Form 19		.19½		
Shipping Tag	1	" 80		.06		
25 yards Cheese Cloth				.72		
Assemble Complete				26.00		
Wash & Clean				1.50		
Final Inspection				7.50		
Scale Inspected				403.52½	390.23½	482.66½
Reflector Assb.	1	2022	Blue	27.23½		
" retaining screw	1	R682	Gold	.12½		
Scale with Reflector				430.88	417.58½	510.01½
Scale with reflector packed for shipment				464.50½	451.21½	543.64½
" " " & 3' stand packed for "				508.65	495.35½	587.78½
" " " & 5' " " " "				509.78½	496.49½	588.92½

Name 503—504—505 "A" Scale "Blue"

Defendant's Exhibit No. 33. 2061

DEFS. EX. 33.
Offered but not admitted
Sheet 3

DESCRIPTION				503 Price per 100	504 Price per 100	505 Price per 100
		2104	Gold			
		2019				
Pan—Platter—Scoop	1	2140	Gold	27.29½	14.00	103.79½
2123 2124 2089 " " " Spider	1		Gold	3.23½	3.23½	5.87½
Spider Retaining Screws	2	R697	"	.18½		
Plunger Regulating Cap	1	2062		5.20½		
Patent Plate	1	2111	Gold	1.43		
" " retaining screws	2	R697	"	.18½		
Housing Opening Plate	1	2072	Blue	7.07½		
" " " retaining screws	2	R705	Gold	.19½		
Front Housing Scroll	1	2067	"	10.35		
" " " retaining screws	4	R705	"	.39		
" " Glass	1	2069		2.75		
Back Housing Scroll	1	2068	Gold	6.55		
" " " retaining screws	3	R697	"	.27½		
" " Glass	1	2070		1.50		
hift Opening Cover	1	2148	Gold	1.93½		
" " " retaining screws	2	484	"	.34		
"B" Pendulum Assb. Complete	1	2118		36.31		
False Bottom	1	2074		2.07		
" " retaining screws	1	R698		.10		
Pendulum Bumper Assb.	1	2103		.64		
" " retaining screws	2	R697	Semi	.17		
"B" Chart	1	104		26.62		
" Screws	4	484	Gold	.68		
" " Counterbalance Washers	2	350	"	.09½		
Housing Agate Bridge Assb.	1	2093		12.17½		
" " " retaining screws	2	R683	Semi	.22		
Check Riser Assb.	1	2105		4.23½		
" " retaining screws	1	R680	Semi	.11		
Connecting Link Pin	1	2113		.13½		
Shift Lug	1	2154		.92½		
" " Screw	1	2020		.11½		
" " Ad. Screw	2	R711	Semi	.20		
Leveling Screw Assb.	1	2090		2.89		
" " Washers	1	564		.05½		
" " Feet	1	2109		.38½		
" " " Rubber	1			.04		
Base	1	2000	Blue	39.26		
Housing	1	2114	"	58.77½		
Base to housing screws	3	R680	Semi	.33		
Carried Forward				255.43½	242.15½	334.57½

Name 503—504—505 "B" Scale "Blue"

DEFS. EX. 33.
Offered but not admitted
Sheet 4

DESCRIPTION				503 Price per 100	504 Price per 100	505 Price per 100
Brought Forward				255.43¾	242.15½	334.57½
Base Plate Assb.	1	2126		100.98¾		
" " retaining screws	4	R698	Semi	.40		
.31 Gal Dash Pot Oil				.12½		
Workmans Slip	1	Form 19		.19½		
Shipping Tag	1	" 80		.06		
25 yards Cheese Cloth				.72		
Assemble Complete				26.00		
Wash & Clean				1.50		
Final Inspection				7.50		
Scale Inspected				392.92¼	379.64	472.06
Reflector Assembled	1	2022	Blue	27.23¾		
" retaining screw	1	R682	Gold	.12½		
Scale with reflector				420.27¾	406.99½	499.41½
Scale with reflector packed for shipment				453.90½	440.62½	533.04½
" " " & 3" stand packed for "				498.04¾	484.76½	577.18½
" " " & 5" " " " "				499.18¾	485.90	578.32

Name 503—504—505 "B" Scale "Blue"

Defendant's Exhibit No. 34. 2063

DEFS. EX. 34
Offered but not admitted
Sheet 1

DESCRIPTION				603 Price per 100	604 Price per 100	605 Price per 100
		2104 2019	Gold			
Pan — Platter — Scoop 2123 2124 2089	1	2140	Gold	27.29½	14.00	103.79½
" " " Spider	1		Gold	3.23½	3.23½	5.87½
Spider Retaining Screws	2	R697	"	.18½		
Plunger Regulating Cap	1	2062		5.20½		
Patent Plate	1	2111	Gold	1.43		
" " retaining screws	2	R697	"	.18½		
Front Chart Plate	1	2146	"	20.33½		
" " " retaining screws	4	R705	"	.39		
Back Housing Scroll	1	2116	"	5.35½		
" " " retaining screws	3	R675	"	.27½		
Back Housing Glass	2	2070		3.00		
Front Indicator Glass Retainer (Flat)	2	923		.42½		
" " " " retaining screws	2	R697	Semi	.17		
Chart	1	1538		17.71½		
" Screws	2	484	Gold	.34		
Shift Opening Cover	1	2148	"	1.93½		
" " " retaining screws	2	484	"	.34		
Pendulum Assembled	1	2151		39.28		
False Bottom	1	2074		2.07		
" " retaining screw	1	R698		.10		
Pendulum Bumper Assb.	1	2103		.64		
" " retaining screws	2	R697	Semi	.17		
Housing Agate Bridge Assb.	1	2093		12.17½		
" " " retaining screws	2	R683	Semi	.22		
Check Riser Assembled	1	2105		4.23½		
" " retaining screws	1	R680	Semi	.11		
Connecting Link Pin	1	2113		.13½		
Shift Lug	1	1254		.92½		
" " Screw	1	2020		.11½		
" " Adj. Screw	2	R711	Semi	.20		
Leveling Screw Assb.	1	2090		2.89		
" " Washer	1	564		.05½		
" " Feet	1	2109		.38½		
" " " Rubber	1			.04		
Base	1	2000	Gold	39.26		
Housing	1	2114	"	58.77½		
Base to housing screws	3	R680	Semi	.33		
Base Plate Assb.	1	2126		100.98½		
" " retaining screws	4	R698	Semi	.40		
Carried Forward				351.32½	338.03	430.46

Name 603 — 604 — 605 Scale "Blue"

DEFS. EX. 34
Offered but not admitted
Sheet 2

DESCRIPTION				603 Price per 100	604 Price per 100	605 Price per 100
Brought Forward				351.32½	338.03	430.46
.31 Gal. Dash Pot Oil				.12½		
Workmans Slip	1	Form 19		.19½		
Shipping Tag	1	" 80		.06		
25 yards Cheese Cloth				.72		
Assemble Complete				26.00		
Wash & Clean				1.50		
Final Inspection				7.50		
Scale Inspected				387.42	374.12½	466.55½
Reflector Assembled	1	2022	Blue	27.23½		
" retaining screw	1	R682		.12½		
Scale with reflector				414.77½	401.48½	493.91½
Scale with reflector packed for shipment				448.40½	435.11	527.54
" " " & 3' stand packed for shipment				483.72	470.42½	562.85½
" " " & 5' " " " "				484.93	471.63½	564.06½

Name 603 — 604 — 605 Scale "Blue"

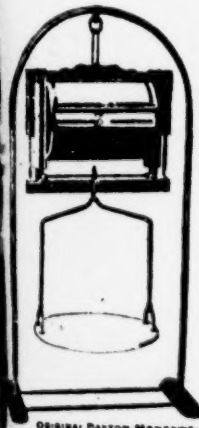
3199
2065

TO THE PUBLIC:

Don't Buy Anything Over Scales Like These. They have been Tried and Condemned By the United States Circuit Court of Appeals

READ THE COURT'S DECISION

ORIGINAL NO. 61



ORIGINAL DAYTON-MONEYWEIGHT, BARREL-SHAPED, SPRING-BALANCE, COMPUTING SCALE NO. 61.

Dishonest Scales

MADE AND SOLD BY

The COMPUTING SCALE CO.

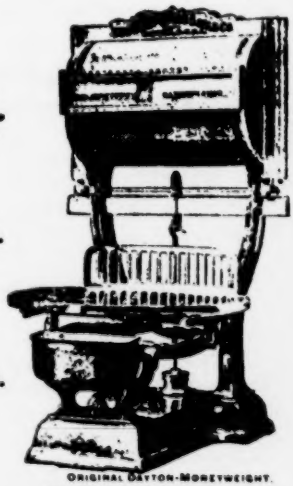
DAYTON, OHIO

AND SOLD BY

MONEYWEIGHT SCALE CO.

CHICAGO, ILL.

ORIGINAL NO. 63



ORIGINAL DAYTON-MONEYWEIGHT, BARREL-SHAPED, SPRING-BALANCE, COMPUTING SCALE NO. 63

CONDEMNED.

On May 25, 1905, the above scales were condemned in England by the Board of Trade, which is the official and the highest authority in that country for testing weights and measures.

On January 9, 1906, the above scales were condemned by the United States Circuit Court of Appeals, at Cincinnati, Ohio.

The above decision of the United States Circuit Court of Appeals is a grand victory, not only for the Toledo Computing Scale Company, but for every honest merchant in the United States, and especially for the buying public.

EXPOSED AND DENOUNCED.

When the Toledo Computing Scale Company began making Scales, we operated as a matter of course, upon the principal that a scale must, of necessity, be accurate and honest.

Later we found upon the market, many barrel-shaped, spring-balance computing scales like those shown on the first page of this circular which are neither accurate nor honest.

We were amazed to find many salesmen selling these scales on the strength of their dishonest features, and the Company itself, actually advertising the dishonest features of the scales to promote their sales.

Upon making these discoveries we exposed and denounced the scales in a circular entitled **"A SHAMELESS ADMISSION"** and warned butchers and grocers against using them.

It was this exposure of the scales which led to the litigation in which the United States Circuit Court of Appeals rendered its comprehensive opinion condemning the scales.

THE LITIGATION.

On December 24, 1904, the Computing Scale Company, of Dayton, Ohio, on the strength of some astonishing statements sworn to by its agents and others, secured at Cincinnati, Ohio, a preliminary injunction against our Company, enjoining us from farther exposing its dishonest scales.

This injunction and the manner in which it was used by our competitors made it appear to the public that we had made false statements and representations concerning the Dayton-Moneyweight Barrel-shaped, Spring-balance Scales.

We appealed from this decision and carried the case to the United States Circuit Court of Appeals.

On December 8, 1905, a sample of the Dayton-Moneyweight Barrel-shaped, Spring Scale, and affidavits showing the facts in the case, were submitted to this higher Court and on January 3, 1906, the Court rendered its decision reversing the order of the lower Court, and dissolving the injunction and wiping it out of existence

This decision of the United States Circuit Court of Appeals was made after hearing and seeing an exhaustive demonstration of the scale during which the Dayton Company for hours, desperately endeavored to defend itself. The Dayton Company knew that its Scales short-weighted the customer, and knowing this, its defense was pitiable.

This decision was a grand vindication for our company. It showed to the world that we were speaking the truth about those Dayton-Moneyweight Scales.

3201

2069

EXTRACTS FROM THE COURT'S DECISION.

After discussing preliminary questions not relating to the merits of the case, the court says in part: (the underscoring is ours.)

"We are, therefore, to decide the case upon its merits. The appellant (Toledo Computing Scale Co.) contends that the complainant (Computing Scale Co. of Dayton, Ohio,) did not come into Court with clean hands, that the business it was seeking to protect was dishonest, that it involved the deceiving and defrauding of the public by the use of a false weighing apparatus whereby the purchaser might be cheated in failing to get as much as he supposed he was buying; and that a court of equity would not lend its aid to such a business. No doubt the principle thus invoked is well established. It is a constant maxim of the court that it will not relieve a party who seeks its protection in the prosecution of a dishonest business. The question before us is therefore, one of fact. Were the scales of the complainant of the character imputed to them?"

"The offences charged to the appellant (Toledo Company) are in a large measure the sequence of the distribution to the trade by the appellee (The Dayton Co.) of circulars descriptive of its "Butcher's Scale" and obviously intended to show the benefits which would accrue to the users of them in selling butcher's goods to the public. One of such circulars was this:

Can You Do This On Your Scale?

Buy 20 lbs. pork loins at 9c. a pound, retail them to your trade at the same price and get your money back?

We can on our scale and make you 3 PER CENT PROFIT BESIDES.

If your business amounts to $10 a day sales we can earn you 30c. in fractions you don't get now. Thirty cents a day means that you buy this scale every 100 days. How long have you been in business? How many have you bought in that time? Think of it

ONE SCALE LOST EVERY 6 MONTHS

LET OUR MAN PROVE THIS.

MONEYWEIGHT SCALE CO.

47 STATE STREET. CHICAGO, ILL.

"On the reverse side of this circular was a picture of the scale, and it was said of it that it gives the butcher the odd fractions to which he is justly entitled. This feature alone in the average meat and produce market will not only save the cost of the scale in a short time, but in a large market will save clerk's hire, which saving on the old pound and ounce scale is entirely lost."

"The circular of the appellee (the Dayton Co.) above set forth produces a strong impression upon our minds that the scales in question were designed for the purpose of enabling the users to impose upon the purchasing public by inducing the belief on the part of the latter that they were getting what they were paying for, when in fact they were not. If these scales realized to the butchers what is claimed for them, they gained a distinct advantage over the ordinary method of weighing and fixing the price which the purchaser would understand to be the test of his bargain. He would have no understanding of the intricacies by which the result is reached. It is not intended that he will know. But he would doubtless suppose that in effect the result would be the same as in the familiar practice of weighing, and he depends upon the honesty of the scale and the man in charge of it to give him the equivalent of that effected by standard weights and measures. In fact the opportunity which these scales give the user to deceive his purchaser in this regard is the very thing which the makers of them hold out as the attraction to the buyers of the scales. The alluring suggestion to the user that he has been wronging himself by using common methods of weighing is in itself a confession that the new method is designed to enable him to gain an advantage which he has hitherto been unable to enjoy."

"A demonstration of the operation of the scale made before us at the hearing, confirms the belief that by its use the purchaser never gains, but the seller generally, possibly not always, gains over the results obtained by the ordinary methods of weighing, and that this gain would be as much or more than 3 per cent, apparently considerable more."

EXTRACTS FROM THE COURT'S DECISION.

"Immediately on increasing the weight on the platform beyond the even numbered ounces the lower line of total prices showing the price for two ounces more, begins to appear and is very soon apparent. The agents of the appellee (The Dayton Co.) instructed the dealers that the lower line was the one to be read when both lines were visible. The appellee's circular to the trade says 'let our man prove this.' That is, how to use the scales in order to sell at cost and make the profit. And it would be the natural thing to expect that the user would read the lower line, if he was inspired with the purpose of the manufacturer; but, more than this, the eye of the user would be fixed on the price per pound on the lower edge of the slit as his guide and the lower total price would be the one next contiguous to it."

"No prices are shown for any weight between even ounces. And in use, no such computations are made. The special advantage attributed to all computing scales is that they dispense with calculations, and show to the operator just what the whole value is. So that any person who can read figures is competent to use them.

"And in another circular they (The Dayton Co.)say of their computing scales in general: 'This is the only absolutely automatic scale made, no counting or adding; put the goods on the platform and read the values in plain figures, a child can make no mistakes.'"

"We should require the impression which we get of the appellee's scale (meaning the Dayton Scale) and the business of making and selling it from its circulars and instructions, to be removed before we could sanction the employment of the process of the Court in its protection. As the proof, so far, only serves to deepen it, we must, therefore, reverse the order granting the injunction, and direct that the cause be proceeded with, in due course. It is so ordered."

With the assistance of the honest merchants of this country, we propose to raise the standard of the computing scale industry. We propose to expose any company which may resort to trickery or fraud in the sale of scales.

Five Reasons Why We Denounce Dishonest Scales.

1. **To make a dishonest scale is unfair competition to the maker of an honest scale.**
2. **To sell a dishonest scale is unfair competition to the seller of an honest scale.**
3. **The use by any merchant of a dishonest scale is unfair competition to the merchant who uses an honest scale.**
4. **The use of a dishonest scale corrupts the morals of the young clerk. He is led to look lightly upon stealing. If he robs the public, may he not soon rob his employer?**
5. **The use of a dishonest scale is a fraud upon the public.**

TOLEDO COMPUTING SCALE COMPANY,

MAKERS OF HONEST SCALES,

TOLEDO, OHIO. - - U. S. A.

3203
2073

TOLEDO

Number 344

THE ONLY SPRINGLESS AUTOMATIC CYLINDER COMPUTING SCALE IN THE WORLD

A Scale has a double duty to perform.
It should protect both merchant and customer.

THE TOLEDO SERVES BOTH WITH EQUAL FIDELITY

THE MERCHANT'S SIDE

IT PROTECTS THE MERCHANT

It is automatic.
It has no springs.
It is not affected by changes in temperature: therefore, when once balanced, it stays balanced.
No air-pumps to clog up and cause friction.
It is honest, and everybody knows it.
It always indicates correct weight and values.
No mental calculations. No guessing.
It protects the merchant from the danger of short-weighting his customers.
It trains clerks to be accurate.
It prevents mistakes.
It saves time, labor and money.
It pays for itself.

THE TOLEDO SCALE INCREASES THE MERCHANT'S MOST VALUABLE ASSET—THE NUMBER OF HIS CUSTOMERS

3:204

2075

IT PROTECTS THE CUSTOMER

It guarantees honest weight and values.

It has no springs, therefore is always reliable.

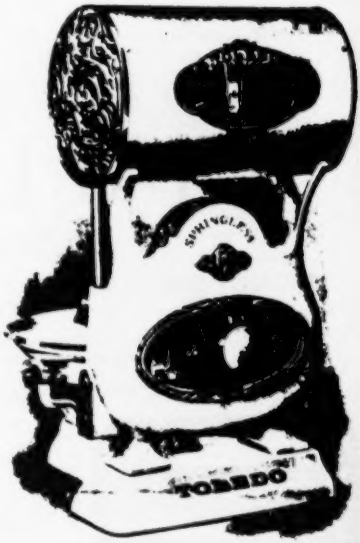
It shows the customer at a glance the correct weight of his purchase.

It prevents errors in calculation.

It gives full weight on every purchase, large or small.

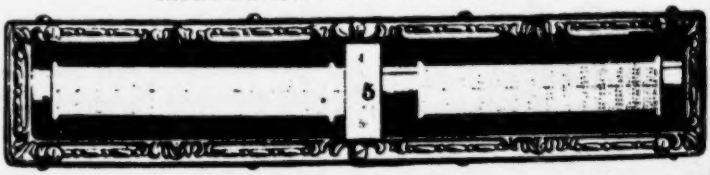
It is rapid in operation, giving customers quick service.

It shows the merchant to be enterprising and trustworthy.



THE CUSTOMER'S SIDE

THE INDICATOR, PROTECTED BY GLASS COVERING



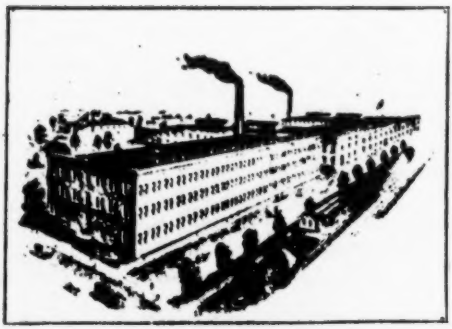
Above picture shows the position of the chart with five pounds on the scale.
The pound and ounce indications are shown by the large figures in the middle column.
The prices per pound, ranging from 4c. to 32c., are shown by the bottom row of figures.
The total values are indicated by a red line extending across the middle of glass-covered openin
Look at above illustration. The value at 20c. per pound is $1.00.

TOLEDO COMPUTING SCALE CO.,

MAKERS OF HONEST SCALES. TOLEDO, OHIO, U. S. A

3205
2077

The Toledo Scale is exceedingly simple, strong and durable.
Its beautiful and lasting finish makes it the most attractive fixture in the store.
A written guarantee goes with every Scale.
The sign, "Honest Weight and Values Guaranteed," pleases customers, inspires confidence and increases sales.



FACTORY OF TOLEDO COMPUTING SCALE CO.
MAKERS OF HONEST SCALES
TOLEDO, OHIO, U. S. A.

CAPITAL STOCK, $[illegible]

DIRECTORS

L. S. Rose, Newark, N.J.
C. E. Young, Newark, N.J.
Jerome Taylor, Newark, N.J.
J. B. Rose, New York City.
Eugene Unger, Newark, N.J.
Henry Theobald, Toledo, O.

3:206

2079

No Man Can Afford to Use a Dishonest Scale

A Shameless Admission.

Below is a photographic copy of one side of a circular advertising those spring-balance, barrel-shaped computing scales.

Did you ever see anything so brazen and shameless? Can it mean anything other than that their scale will steal three cents out of every dollar?

This is the admission. Read it carefully:

Photographic Copy

Can You Do This?

ON YOUR SCALE

Buy 20 lbs. pork loins at 9c a pound, retail them to your trade at the same price and get your money back . . . . . .

We Can

on our scale and make you

3¢ PROFIT BESIDES

If your business amounts to $10.00 a day sales we can earn you 90c in fractions you don't get now.

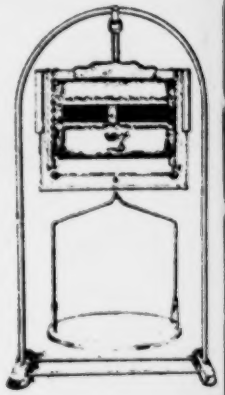
Thirty cents a day means you **buy this scale** every ten days. How long have you been in business? How many have you bought in that time? Think of it. **One scale lost every six months.**

Let our man prove this

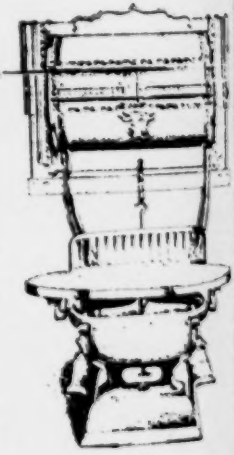
Moneyweight Scale Co.

[illegible] State Street

CHICAGO, ILL.



The use of a dishonest scale is unlawful and the user is liable to arrest, fine and imprisonment.



How could a man **with honest scales** get $1.85, as claimed above, for $1.80 worth of pork? **ROT!!!**

CAN YOU AFFORD TO USE SUCH A SCALE?

You may say, "I have bought and paid for the scale. I have my money in it. What shall I do with it?"

Return the scale and demand your money back.

No company has a right to take your money for a computing scale that indicates false values and no judge or court would require you to pay for such a scale.

If you bought such a scale you were imposed upon

Go to your lawyer. Show him your scale and get **his** opinion.

Don't wait until you are arrested!

Write us and we will send you "Decisions of Two Courts" on the subject of dishonest scales. These decisions are of vital importance to every merchant.

Toledo Computing Scale Company

Toledo, Ohio, U. S. A.

DEF. EX. 43.

Moneyweight Scale Co.
vs.
McBride
Decision of the
Massachusetts Supreme Judicial Court
October 19, 1908
Reprinted from
The Banker & Tradesman
Boston, Mass.

Moneyweight Scale Co. *vs.* McBride
(Massachusetts Supreme Judicial Court)
Decided October 19, 1908

Loring, J.—On October 1, 1907, an act of the General Court (St. 1907, c. 535) went into effect entitled "An act to provide for the testing and sealing of weights, measures and balances having a device for indicating the price as well as the weight of commodities offered for sale." By s. 1 it is provided that R. L. c. 62, relating to testing and sealing weights, measures and balances "shall apply to all scales, balances, computing scales and other devices having a device for indicating or registering the price as well as the weight of the commodity offered for sale. All such computing devices shall be tested as to the correctness of both weights and values indicated by them." By s. 2 it is provided that "a sealer or deputy sealer shall seal such devices when tested and found correct, or shall mark, condemn or seize such devices if incorrect," in accordance with R. L. c. 62; and all penalties imposed for violations of the provisions of R. L. c. 62, relative to weights, measures and balances shall apply to such devices.

On November 29, 1907, this bill in equity was brought by the plaintiff, an Illinois corporation, against the sealer of weights and measures of the city of Cambridge. The bill in substance alleges that it is the sole vendor of weighing and value indicating scales manufactured by the Dayton Company of Ohio, known as barrel-shaped computing scales and manufactured on what is called the secondary principle; that the weights and values indicated by them are correct and accurate; that it has sold large numbers of them in Cambridge, in Massachusetts and in the United States generally, on the conditional sale instalment plan; and that money is still due

the plaintiff on many of these sales. The bill further alleges that the defendant intends to condemn all secondary principle barrel-shaped computing scales, and seeks to have him enjoined from so doing. The defendant filed an answer which in substance denied that the aforesaid scales were correct and accurate in the values therein set forth. Issue was joined. The case was heard on the merits, the evidence was taken by a commissioner, a decree was entered dismissing the bill, and the cause is now before us on an appeal from that decree.

The plaintiff and defendant have argued at length the correctness of the kind of computing scales here in question. But the correctness of these scales is not now before us. The decision of that question is committed by the statutes to the sealers of weights and measures of the several cities and towns of the Commonwealth. If a sealer of weights and measures in deciding that question should proceed on erroneous principles of law, his decision could be quashed on certiorari, and in some cases a writ of mandamus might issue directing him to take specific action. See for example Darrigan v. Williams, 198 Mass. 457. But there is no jurisdiction in this court to take from the public officer selected by the act the duty of deciding the question committed to him for decision by the act, on the ground that he threatens to come to a wrong conclusion. That is what this plaintiff asks the court to do so far as the correctness of the threatened decision b ythe defendant (as sealer of weights and measures for the city of Cambridge) is concerned.

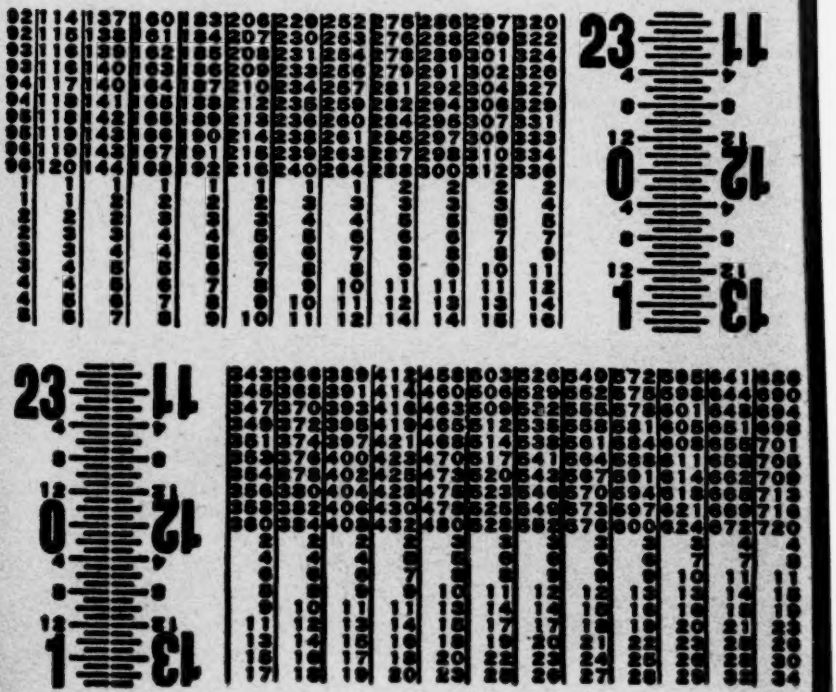
There is, however, a second ground on which the plaintiff seeks to maintain this bill in equity, namely, that St. 1907, c. 535, is unconstitutional. That question is properly raised by a bill in which the plaintiff seeks to have the defendant enjoined from taking action under it which will affect his rights of property. Board of Liquidation v. McComb, 92 U. S. 531. Such a bill proceeds on the same footing as a bill to enjoin a public officer from doing an act colore officii which is in fact and in law outside his jurisdiction. See for example Owens v. Crossett, 105 Ill. 354; Wetherell v. Newington, 53 Conn. 67; Morgan v. Miller, 59 Ga. 481; Belknap v. Belknap, 2 Johns (Ch.) 463.

In passing upon this second question the arguments put forward on the first question are pertinent although that question is not now directly before us. No better way can be found for demonstrating what the statute has committed to

the final decision of the three hundred and fifty-four sealers of weights and measures of the cities and towns of the Commonwealth than to state the arguments which have been made here on the question which those officers have to decide. We speak of the question which has been finally committed by St. 1907, c. 535, to the three hundred and fifty-four sealers of weights and measures because there are thirty-three cities and three hundred and twenty-one towns in the state.

Before taking up the arguments put forward here upon the correctness of these computing scales, it is necessary to understand what they are. As we have said the scales made by the plaintiff are self-computing scales, built on what has been styled the secondary principle. Scale No. 63 was taken at the trial as a type of these scales. The chart indicating the value of the several weights is the thing on which the correctness or incorrectness of this scale depends, so far as it registers the prices.

A facsimile, somewhat reduced in size, of portions of this chart is as follows:



The center is duplicated in the portions given because the limits of a single page do not admit of otherwise reproducing a facsimile.

The large figures, 23—0—1, reading down on the left of the center, and 13—12—11, reading upon the right of it, represent the pounds, and the intermediate figures 4, 8 and 12, the ounces which the article put upon the scale weighs. The figures in the several columns in alignment with the one-pound line, for example, represent the value of one-pound at the prices there stated. We assume (although it is not so stated in the evidence) that the first of the two figures 13 means 12½.

This chart is put around a small barrel or drum which contains a set of balances and springs which weigh the article, the weight and value of which are to be stated by the scale in question.

For example, if the article weighs 23 pounds 4 ounces, and is 14 cents a pound, the operator finds the value by looking at the figures in the 14 cent a pound column opposite that weight, and he finds it to be 326 cents.

The drum on which this chart is rolled is under a cover. That cover, on the side of it next to the dealer, has a slit extending across the whole chart, to enable him to read the value as well as the weight of the article put upon the scale. There is also a slit on the customer's side of the drum, which enables him to see the center of the chart, that is, the weight and the weight only. The reason why the figures on the two sides of the center are in inverse order is to enable the same figures to appear on the opposite sides of the chart at one and the same time.

Scale 63, in the words of the plaintiff's principal witness, is intended "for the butcher and market trade." As will be seen on inspection, it indicates each ounce of the meat or other piece of provisions sold, and the value of each two ounces at the several prices for which the chart is drawn up (4, 5, 6, 7, 8, 9, 10, 11, 12, 12½, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29 and 30 cents), when meat or other provisions are sold by weight. The evidence showed that scale 63 and a similar scale numbered 61 are also used, and are intended by the plaintiff to be used to indicate the correct weight when so many cents worth of meat or other provisions at a specified price are asked for by the customer and sold by the dealer. This evidence also showed that among

the poorer classes this method of dealing is not an infrequent one.

The numbers given in the center column confessedly state with correctness the weight of the article on the scale. As a scale the machine is correct.

The several numbers given in alignment with every two ounces are confessedly commercially correct value where an article is sold by weight. The plaintiff contends that they are correct within the meaning of St. 1907, c. 535. The defendant contends that the values indicated for the odd ounces are in many cases not even commercially correct. What is meant by these two contentions is best shown by an example. Suppose a customer asks for half a pound of cheese at 11 cents a pound. A piece is cut off a cheese and placed upon the scale, and the indicator in the center shows that it weighs 9 ounces. The same indicator will be exactly half way between two lines, one in alignment with 8 ounces and the other in alignment with 10 ounces. In the case put it will be exactly between the figures $^{6}_{7}$. The price indicated by the chart is half way between 6 and 7 cents, that is to say 6½ cents. The half cent cannot be paid in addition to six cents nor returned if the customer pay 7 cents. Under the commercial custom, which is the plaintiff's sole justification for the figure 6 on the chart now in question and for similar figures placed upon it (as we shall see hereafter more at length), the dealer takes the half cent and charges the customer 7 cents for his cheese.

In point of fact the value of the cheese in the case put is 6 3-16 cents and under the commercial custom the fraction being less than half a cent belonged to the customer, not to the dealer. The amount legally due for the piece of cheese in question is 6 cents.

The reason why the chart (in the case put above) gives 13-16 of a cent to the dealer in place of giving 3-16 of a cent to the customer, is that a fraction of a cent in favor of the dealer is included in the figure 6 opposite 8 ounces. Eight ounces at 11 cents a pound are 5½ cents. The chart gives the dealer the benefit of the half cent and calls eight ounces 6 cents. Therefore, when the dealer taking the mean between 6 cents and 7 cents for 9 ounces finds that the price is 6½ cents, and takes to himself that half cent, he gets a fraction of a cent twice.

The plaintiff's first answer to this is that this is a dishonest use of an honest chart, that it is dishonest to use a commer-

cially correct figure as an arithmetically correct figure, and that if that be done it is not the chart that is to blame but the dealer who uses it dishonestly.

That argument assumes that the ordinary dealer knows that some of the prices on chart 63 are commercially correct and some arithmetically correct. More than that, that argument assumes that the ordinary dealer knows which of the 4608 prices on chart 63 are commercially and which are arithmetically correct. Still further, that argument assumes that the ordinary dealer in using the chart can and will, in the hurry of business, carry in mind which of the prices are commercially and which are arithmetically correct, and, in ascertaining the price not stated in terms on the chart but indicated upon it by the marker coming between two of the prices placed thereon, will bear in mind which prices are commercially and which are arithmetically correct, and take to himself or give to his customer the benefit of the fractions accordingly.

There is nothing on this chart that tells the dealer who buys it that some of the prices are not arithmetically correct. In the absence of such a notice the ordinary dealer would not even necessarily know that any of them are not arithmetically correct. But when the other two assumptions underlying this argument are reached, namely, that some prices on it are only commercially correct and the dealer using it should not only know which are arithmetically and which are commercially correct, but should act upon that in the hurry of business in giving or taking the fractions when fractions are involved in the value of odd ounces, it may well be urged that the argument cannot carry the load put upon it and collapses.

The next answer made by the plaintiff's counsel is that the dealer has no right to use the chart to get the value of the odd ounces.

Apart from special directions from the plaintiff, it might well be thought that when the indicator points to an odd ounce on this chart, exactly half way between the even ounces, it indicates that the value of the odd ounce is exactly half way between the values given for the even ounces, and that the defendant is chargeable with knowledge that that is the meaning of the chart in such a case and is chargeable also with knowledge that dealers will so understand and use it.

But this was not the only answer made to this argument of the plaintiff. The other answer made was that the plaintiff has told purchasers of its machines to do the very thing which

it now says ought not to be done, and which, if done, it now says is wrong, and which (it now says) is the wrong of the dealer and not its (the plaintiff's) wrong. There was evidence that on June 14, 1906, the plaintiff sent to its salesmen two stickers to be put "just above the opening so it can be readily seen by the operator of the scale," "wherever you find one of our barrel-shaped scales." The first sticker to be used on scales where an indicator records the weight in the center of the chart is as follows: "To ascertain value, read figures adjacent to the price per pound when indicator is on even ounces; when indicator is on odd ounces or between even ounces take the mean of figures." The second sticker to be used where an indicating line is used in place of the indicator is: "For value, read figures when indicating line is directly over center. When indicating line is between center, take mean of figures."

This brings us to the contentions of the plaintiff and of the defendant as to the other use made of computing scales Nos. 63 and 61, namely, where a customer asks for so many cents' worth at a specified price and the scale is used to ascertain what weight should be given.

The alleged incorrectness of the chart when used in this way is also most easily shown by an example. Suppose four cents' worth of cheese is asked for at 7 cents a pound. In the seven cents a pound column are two 4's, one opposite 8 ounces and the other opposite 10 ounces. A dealer naturally would or certainly might take the upper of these two 4 cents and deliver to his customer 8 ounces. The customer is entitled to 4-7 of a pound, or a little more than 9 ounces.

It is argued that the incorrectness of this chart when used in this way (to find the weight from the price) comes from the fact that values which are commercially but not arithmetically correct have no place upon such a chart. It is urged still further that they have no place on such a chart for these reasons: Where a customer buying by weight asks for an amount the price of which is not divisible by our currency, the fraction of a cent must be given to the customer or taken to himself by the dealer. But where the amount asked for by the customer is to be measured by its value and the dealer consents to sell on that basis, he is bound to give the customer the exact amount due him at that price if it can be weighed out to him.

In the case put above the customer is entitled to 9 ounces and 1-7 of an ounce. It may be that there is a question as to

how this 1-7 of an ounce is to be dealt with in case of a scale which gives only ounces, for example. How such a fraction should be dealt with in such a case need not be determined here, it is urged. But what is clear as a matter of law (it is also urged) is that the dealer in the case put above does not give the weight due to the customer when he gives the customer 8 in place of 9 ounces. The fraction to be disregarded here (if there be one) is the fraction of the ounce, not the fraction of a cent. And prices which are only commercially (not arithmetically) correct because calculated to give to one or the other those fractions of a cent which result from a sale by weight are not correct when used to sell by the money's worth and not by weight.

The first answer made to this by the plaintiff's counsel was that the chart was designed to give value for weight, and if used to give weight for value it is used in a way for which the plaintiff is not responsible.

Here again it is a matter of common experience that in the "butcher and market trade" articles are bought and sold on the basis of so many cents' worth at a specified price. And there was evidence in the case at bar confirming this matter of common experience. In selling such an automatic self-computing scale under these circumstances the plaintiff must be taken to have intended it to be used not only to show the price of a specified weight but the weight at a specified price.

More than that, in making this contention there was evidence that the plaintiff for a second time was not altogether frank. In a circular sent out by the plaintiff to dealers who had bought No. 61 scales, to be distributed by them among their customers, is found this statement: "The use of this machine renders it impossible for you to lose one cent on account of short weight or a mistake in calculation. For example: Should you call for 25 cents' worth of an article, when that article is placed upon the machine it will show its exact value in money." An attempt was made at the trial to confine this circular to scales of another type. But there was evidence that at the head of this circular there was the representation of a scale which is in fact a cut of a No. 61 scale.

We come now to the argument that St. 1907, c. 535, is unconstitutional.

The first contention made by the plaintiff's counsel in this connection is that since by the construction of these scales (taking No. 63 as a type) the scales are not the arbiter of the

price but only of the weight, the regulation of the computing part of such a scale is not within the police power of the state. His argument in support of that contention is: "In ascertaining the value of a given weight at a certain price per pound, there is no common arbiter in the control of either party to which both parties appeal. The sole arbiter is the multiplication table whose dictates are changeless. But the mental process of computation of either purchaser or dealer, the other party to the transaction does not accept. He makes it for himself. Hence any instrument making a computation for the dealer does not enter into the transaction; just as the dealer's table of values would not enter into a sale, so the computed values on the chart of the computing scale do not enter into the transaction over the computing scale. The law has no more right to interfere with the chart of computing values in the scale than it would have to interfere with the table of computed values kept by a merchant."

We have no doubt that it would be within the police powers of a State to forbid the sale of incorrect tables of value to be used by dealers as correct tables in making sales of articles dealt in by them over an ordinary pound and ounce scale. In saying this we mean to put the case where the table is to be hung upon the dealer's wall and is not to be seen by the customer. By such a table of values not only would an honest dealer be tricked into making dishonest charges, but at least many customers would be cheated. For it is a matter of common experience that many customers accept the computation made by the dealer without verifying its correctness.

We are also of opinion that it is equally within the police power of the State to forbid the sale of such a table when it is made part of an automatic self-computing scale.

Had the Legislature enacted a law forbidding the sale of self-computing scales like the plaintiff's scale No. 63, it would (in our opinion) have been within the police power of the General Court.

But that is not what the Legislature did in enacting St. 1907, c. 535. More than that in St. 1907, c. 535, the Legislature did not enact a statute where authority is given to an administrative officer to forbid the sale of a thing which can be regulated under the police power of the Legislature, in case he deems it to be contrary to law, until the court can determine the legal questions involved, as was the case in New York Life Ins. Co. v. Hardinson, 85 N. E. Rep. 410. The act here in question (St. 1907, c. 535), makes the decision of

each one of the three hundred and fifty-four sealers of weights and measures of the Commonwealth final upon the correctness of "computing scales and other devices having a device for indicating or registering the price as well as the weight of the commodity offered for sale." The statute provides that: "All such computing devices shall be tested as to the correctness of both weights and values indicated by them."

If the correctness of the values indicated by such scales and other devices is to be tested by arithmetic, that is to say, if the values are to be arithmetically correct, the acts of the several sealers of weights and measures are of the same character as their acts in determining the correctness of an ordinary pound and ounce scale and the statute is constitutional. The act of a sealer of weights and measures in determining whether a scale balances when nothing is on it and whether it indicates accurately the standard weights when they are placed upon it is an act ministerial in its character. All that the officer is called upon to do in performing this act is to be correct in his observation. Such an act not only may be but must be left to an executive officer. The determination of the correctness of a table of weights and values which is required to be arithmetically correct is of the same character.

But if the correctness to be finally passed upon by a sealer of weights and measures under St. 1907, c. 535, is the commercial correctness of the values indicated by such scales or other devices as the correct value for a given weight, that is to say, the sum legally due for a certain weight, and con versely, when articles are sold by the cents' worth, the weight legally due for the value specified, we are of the opinion that the act would be unconstitutional. Such an act would leave to the final determination of a sealer of weights and measures the questions discussed in the arguments made at the bar as to the correctness of the computing scales under consideration here. That is to say, it would leave to an executive officer (first) the determination of the question how great a departure from mathematical accuracy would be permissible in determining the values of small articles sold by weight involving fractions of a cent without making the transactions commercially and therefore legally incorrect, and (second) the question whether a table of values which are only commercially correct because they disregarded fractions of a cent is the proper basis for a table to be used to find the true weight

of articles sold by the cents' worth. Those questions are judicial questions and cannot be left to the final determination of an executive officer.

In addition we are of opinion that the Legislature did not intend to leave to the final determination of three hundred and fifty-four municipal officers the final determination for the territory covered by their several municipalities the puzzling questions upon which the commercial correctness of these computing scales depends. It is enough to point out in that connection that different results might be expected to be reached in this question by such officers.

For these reasons we are of opinion that the General Court, when it enacted St. 1907, c. 535, by which the correctness of self-computing scales and the other devices therein mentioned was committed to the final decision of the sealers of weights and measures for the several cities and towns of the Commonwealth, must (in our opinion) have intended that the values to be placed on such charts should be arithmetically correct. So construed, St. 1907, c. 535, was a valid statute, and the decree dismissing the bill must be affirmed.

So ordered.

COOLIDGE & HIGHT,
JOHN M. ZANE and
CHAS. F. MORSE
For complainant.
GILBERT A. A. PEVEY,
City solicitor, and
ALBERT H. MEADS
(of Chicago, Ill.)
for defendant.

3218

3219
2093

NO SPRINGS

NO SPRINGS

Toledo

Springless Automatic Computing Scale

The Only Automatic Computing Cylinder Scale Without Springs

Spring Scales cause loss of money and customers. The "Toledo" stops those losses.

The Toledo is quick in operation and easy to read.

It is beautiful and attractive.

It's a Money-Saver and a Money-Maker.

It costs nothing because it pays for itself.

MERCHANT'S SIDE

Because It Has No Springs

The "Toledo" is the most Reliable, Sensitive, Accurate and Durable Scale ever made.

Because it has no springs it is not affected by changes in temperature, therefore always gives correct results.

It never gets out of balance.

Gives correct weights and values, instantly and automatically.

Stops the giving of overweight.

Avoids the danger of giving shortweight and losing customers.

Stops the losses due to mistakes in figuring prices.

Saves money, labor and time.

Because it has no springs it gets for the merchant every cent to which he is entitled.

You can't afford to buy any other scale, because the Springless Toledo will outwear any other scale on the market.

The Toledo Is a Trade Bringer

There is no fixture in your store more closely observed by your customers than the scale.

It is the only fixture in which your customers are financially interested.

Everybody knows that spring scales are unreliable. They are neither sensitive nor accurate.

Customers lack confidence in Spring Scales.

Customers like to buy over this new Toledo Automatic Scale because they can see that it contains no springs.

The beautiful, springless mechanism is exposed to view, and there is a sign on the scale in large letters "NO SPRINGS."

There is another sign on the scale reading "HONEST WEIGHT."

This guaranty of Reliability and Honest Weight pleases your customers and attracts new trade to your store.

Over 50,000 Toledo Scales Now in Use
Send for Illustrated Book

Mail today the enclosed postcard and we will send you, free of charge, an illustrated book. It will pay you to investigate. We make many styles and sizes of computing scales, suited to all kinds of stores, at prices from $37.50 up.

We will make a Liberal Allowance for your Old Scale. Second-hand Scales of other makes for sale cheap.

Toledo Computing Scale Co.

MAKERS OF HONEST SCALES

Toledo, Ohio

NO SPRINGS

NO SPRINGS

3221
2097

Some of the Several Thousands of Computing Scales Exchanged for Toledos
Write For Our Liberal Exchange Allowance

hotograph of Spring from Spring Scale. Would you Trust it?

Photograph of a Spring from a Spring Scale. Would you Trust it?

Spring Scales Unreliable

Chambers' Encyclopaedia Vol. 1, Page 672, says, "Spring Scales are made in many forms—but the principle of all is the same—the stretching of a spiral spring, and they have no preten-sion as to great accuracy."

Nelson's Encyclopaedia Vol. 1, Page 588, says, "The Spring Balance becomes unreliable when frequently used."

The New International Encyclopaedia Vol. 16, Page 109, says, "The force of the spring varies with the temperature which alters the length and elasticity of the wire and renders impossible precise measurements."

The New International Encyclopaedia Vol. 17, Page 627, says that Spring Scales "are not as accurate as Balance Scales."

Mail Enclosed Post Card Today for Full Particulars

Read the Sign "The Sign of the Times"

Young's Meat Market, Los Angeles, Cal. Youngs Discarded Dayton Scales and now use Twelve Toledos.

Defendants Ex. 44

3:222

2099

Postmaster

If this is not delivered in five days, notify the sender and postage will be sent for its return.

By Cy 44

3223

2101

(FACSIMILE)

The Boston Herald
October 20 1908

INJUNCTION DENIED MAKERS OF SCALES

Moneyweight Firm Sought to Restrain a Sealer in Cambridge.

The full bench of the supreme court yesterday, in the case of the Moneyweight Scale Company vs. Felix C. McBride, sealer of weights and measures of Cambridge, upheld the constitutionality of chap. 535 of the year 1907 for the testing and sealing of computing scales. This statute is a police regulation within the police power of the Legislature. The company wanted an injunction to restrain the sealer from disapproving any of the barrel shaped scales made by the Computing Scale Company of Dayton, O. Two such scales, Nos. 61 and 63, one being a hanging and the other a platform scale, and used in the butcher's trade, were brought up in this case.

The court construes the statute to intend that the values to be placed on the charts of computing scales should be arithmetically correct, and the final decision of this question should be left to the sealer. The commercial correctness of the values on the chart is not within his province, not being within the purview of the act.

The dismissal of the plaintiff's bill is affirmed. Coolidge & Hight; J. M. Zane and C. F. Morse; G. A. A. Pevey and A. H. Meads.

Toledo Times
November 14 1908

DECISION OF IMPORTANCE

IS HANDED DOWN

By the Supreme Court in the State of Massachusetts.

In a recent decision, handed down by the full bench of the Supreme Court of Massachusetts, certain types of Barrel-Shaped Spring Computing Scales were declared incorrect; making the use of such scales unlawful in that state.

The court's decision constitutes a scathing arraignment of the scales in question, making it clearly apparent that such scales should not be used.

Counsel for the company, whose scales were condemned by the Sealer of Weights, endeavored at the hearing to show that the scales were "commercially" correct, and that the Sealer should not condemn them, but the court ruled that the money values on computing scales should be "arithmetically" correct, and decided the case against the scale company—leaving the Sealers of Weights and Measures free to condemn the scales.

This decision is of vital interest to grocers and butchers everywhere. Local merchants should look into this matter and satisfy themselves that the scales they are using are not the kind declared incorrect by the court.

This decision is of particular interest to Toledo because of our Scale factory. Toledo scales were not involved in this decision. Their correctness has never been questioned.

3:224 2103

MAIL THIS CARD TODAY

For Illustrated Book explaining the Money-saving and Money-making Features of the Toledo Springless Automatic Cylinder Computing Scale.

Date .....

Name .....

City ..... State .....

Street Address ..... County .....

Business .....

POST CARD

One Cent Stamp Here

Toledo Computing Scale Co.

Makers of Honest Scales

TOLEDO,

OHIO

DEF. EX. 45.

1439

UNITED STATES CIRCUIT COURT OF APPEALS,

Sixth Circuit.

Toledo Computing Scale Company,
Appellant,
vs.
Computing Scale Company,
Appellee.

Appeal from the Circuit Court of the United States for the Southern District of Ohio.

Submitted December 8, 1905.

Decided January 9, 1906.

Before Lurton, Severens and Richards, Circuit Judges.

Severens, Circuit Judge, delivered the opinion of the Court.

This cause comes here on appeal from an order of the Circuit Court granting an injunction pending lite upon a bill filed by the appellee for the purpose of restraining the appellant from embarrassing and injuring its business by the publication and dissemination of circulars charging that a certain scale called a Butcher's Computing Scale, manufactured and sold by the complainant, was a false and dishonest scale, and was made and sold by the complainant for the purpose of enabling the user to deceive and defraud the public by giving false weight, that is to say, not so much as the purchaser would suppose he was buying. The bill also charged that the defendant by its agents made like representations to intending buyers of such scales and to those who had already bought them of the complainant, and urged the latter to desist from their use and to return them to the complainant and recover the purchase price when paid or to resist payment

when it had not been paid, offering assistance in any legal controversies that might arise from such action; and further represented that the persons using these scales were liable to arrest and punishment therefor. Affidavits in support of the bill were filed. Upon notice of a motion for a preliminary injunction, the defendant appeared and filed an answer, supported by affidavits, in opposition thereto. The answer is lengthy, containing many averments of alleged facts tending to establish the main defense, which was that the charges contained in the circulars and in the representations of its agents were true. Some minor charges made by the bill were denied, but the principal controversy which we are now required to consider and determine is the issue joined on the main defense above stated.

There are, however, two preliminary questions raised by the appellant which should first be disposed of.

1. The "Toledo Computing Scale Company" is a New Jersey corporation having its principal office at Toledo, in the Northern District of Ohio. The "Computing Scale Company" is an Ohio corporation whose principal office is at Dayton in the Southern District of the same state. Original process was served by the marshal on J. Knoop, as managing agent of the defendant at Cincinnati. A subpoena was also served on the defendant at Toledo, but as that was not in the district where the suit was pending, it is not relied upon as valid service. Section 5043 of the Ohio statutes reads as follows: "When the defendant is a foreign corporation, having a managing agent in this state, the service may be upon such agent."

The defendant moved on affidavits to dismiss the cause upon the ground that Knoop was not a "managing agent" of the corporation. By consent of counsel, depositions of several persons were taken bearing on this question. The following is a summary of the facts found by the court upon this issue, and of some further facts which also appear in the record. Sales of the defendant's scales were made by commission agents. A large extent of territory including cities in Ohio, Michigan, Indiana and, apparently, Kentucky, were in charge of one Dusseau, as supervising agent, who was paid by a commission. This territory was divided up into districts for each of which a salesman was appointed by the supervising agent, subject to the approval of the company. Knoop was one of such appointees and his district included the counties of Hamilton (in which is Cincinnati) and Cler-

mont in Ohio, and Boone, Campbell and Kenton in Kentucky. The salesmen canvass their territory for buyers, sell, and make contracts for the sale of scales, in accordance with prices and terms of payment prescribed by the company, deliver the scales to the purchaser, receive the purchase price in money or notes, and forward the same directly to the company and receive a commission thereon of 30 per cent., which is remitted to them by the company by check; make requisitions on the company for scales and keep on hand as many as in their judgment the trade may require; take orders for repairs, collect debts from customers, and are held responsible for bad debts to the extent of 5 per cent. of their commission; they also circulate advertising matter and do anything else in the conduct of the business required of them by the company. If sales are made in their territory by the supervising agent or the Company, they receive the commission therefor. The supervising agent provides an office or storeroom where the scales are kept and business is transacted by the salesman. At the office there is a sign: "Toledo Computing Scale." The rent for the office is paid by the supervising agent, but this expense is covered by the commission which he receives. The defendant was carrying on a large business at Cincinnati and other places in the district and had no other representative there except salesmen, of whom Knoop was the chief in the territory assigned to him. All scales for that territory were consigned to him and he became responsible for them and for the prices received for them, whether actually sold by him or his helpers. He also kept his company advised of the doing of its competitor, the complainant, in his district. Upon these facts the court held that Knoop was a managing agent within the meaning of the Ohio statute above quoted as construed by the Supreme Court of that state, referring to American Express Co. v. Johnson, 17 O. S. 641, and Railroad Co. v. Transportation Co., 32 O. S. 135. The court properly held that the statute of the state was the guide for making service of process in such cases, and that its construction by the Supreme Court of Ohio was to be accepted as correct. Referring to the case of United States v. Bell Telephone Co., 29 Fed. 17, Judge Thompson, who sat in the court below, said: "These cases (meaning the Ohio cases just cited) were not referred to by Judge Jackson in the Telephone case, nor had he occasion to refer to them, because the facts in that case did not call for a construction of Section 5043, but, on the contrary, showed

conclusively that the Telephone Company had no agent within the jurisdiction of the court. His definition of a managing agent was obiter in respect to the case before him." The Ohio Supreme Court evidently intended to give a liberal interpretation to the statute to facilitate the obtaining of jurisdiction over foreign corporations doing business in the state, and held that one who chiefly represented the corporation in a locality where it was doing business was its managing agent there. And indeed a construction of this statute which restricted the meaning to one who was a general manager would very much limit its utility.

As was said by Mr. Justice Gray in Barrow Steamship Co. v. Kane, 170 U. S. 100, 106, "the constant tendency of judicial decisions in modern times has been in the direction of putting corporations upon the same footing as natural persons in regard to the jurisdiction of suits by or against them."

But it is enough to say that we think the circuit court did not err in following the state court's interpretation of the law and overruling the motion to dismiss.

2. It is further contended that this suit being a suit in equity, ought not to be entertained, because there exists an adequate remedy in an action at law for the recovery of damages. We greatly doubt whether the legal remedy would be adequate. It would be difficult to estimate the damages arising from the destruction or serious impairment of one's business, and the better, more efficient and certain remedy would be an injunction restraining the defendant from perpetrating the wrong. Besides, the injury complained of is a continuing injury and would involve the necessity for a multitude of suits. But if this objection were maintainable it should have been taken in limine, before answering to the merits.

1 Dan. Ch. Pl. & Pr., 550, note, 4th Ed.
Reynes v. Dumont, 130 U. S. 354, 395.
Kilbourne v. Sunderland, 130 U. S. 505.
Brown v. Lake Superior Iron Co., 134 U. S. 530.
Perego v. Dodge, 163 U. S. 160.
Reynolds v. Watkins, 60 Fed. 824, 9 C. C. A. 273.
McConnell v. Prov. Sav. Life Assur. Soc., 69 Fed. 115.
Elder v. McClaskey, 70 Fed. 529, 554-5.

The right to a trial by jury when there is a suitable remedy at law is confirmed by Rev. Stat., Sec. 723. But that

right is one which the defendant may waive; and he does waive it if he answers to the merits without claiming it. This, of course, does not preclude the court from raising the objection if the case made by the bill is plainly unsuitable for the exercise of the jurisdiction of a court of equity. But no one can, as it seems to us, doubt that the remedy by injunction is, at least, suitable to the facts of such a case as this, if the complainant is entitled to any relief whatever.

We are, therefore, to decide the case upon its merits. The appellant contends that the complainant did not come into court with clean hands, that the business it was seeking to protect was dishonest, that it involved the deceiving and defrauding of the public by the use of a false weighing apparatus whereby the purchaser might be cheated in failing to get so much as he supposed he was buying; and that a court of equity would not lend its aid to such a business. No doubt the principle thus invoked is well established. It is a constant maxim of the court that it will not relieve a party who seeks its protection in the prosecution of a dishonest business. The question before us is, therefore, one of fact. Were the scales of the complainant of the character imputed to them? The court below was of opinion that they were not. This being an appeal from an order granting a preliminary injunction, we should, as we have often held, give much weight to a finding of fact by the lower court, and according to that court a large discretion. But the law which allows an appeal from such orders at this stage of the case requires that we should exercise our own judgment, and, while observing the rule just adverted to, form our own conclusions. In stating these we may properly also repeat what we have said in former cases, that is to say, that our conclusion is not final. In the nature of things it cannot be, for the case is not presented upon full proofs, and these may be such that the court below may, and ought to, come to a different conclusion from that which the present record compels.

The scales which are the subject of this controversy are called "computing" scales, that is to say, they weigh, compute at a given price per pound and exhibit the whole price of the article placed upon the platform. This particular kind of computing scales is called the "Butcher's Scale," though it is said it may also be used by grocers, and consists of the ordinary scale platform, having perpendicular standards at the rear which support the weighing and computing apparatus. A rod extends from the platform bearing upward to

the weighing and computing apparatus, and actuates by intermediate connections the spring device, which latter in turn actuates the indicating devices. This apparatus is contained in a horizontal cylinder having a slit along the front side of its length, which discloses on an interior cylinder, by graduations along its length, the whole price computed upon the number of pounds having a definite relation thereto. On the face of the lower rim of the outer cylinder is a line of graduated prices per pound; and the column of total prices on the inner cylinder at that price per pound runs around the surface of the inner cylinder so that the whole column of total prices is exhibited by a revolution of the inner cylinder, in the sectional plane thereof perpendicular to the price per pound marked on the outer cylinder. There is a slit on the opposite side of the outer cylinder showing the weight to the purchaser, but only that—the minutiae of the organization is too complex and elaborate to be readily understood without illustration by reference to the scale itself. The general principles upon which such scales operate are explained in the opinion of this court in Standard Computing Scale Company v. Computing Scale Company, 126 Fed. 639, in which several patents used in their construction were involved, and to which reference may be made. For the present purpose we shall suppose the complainant's organization of the particular scales in question to be such as will accomplish the results which the complainant claims, in its circulars to the trade, to be their superior advantages. The case before us does not involve the special consideration of other kinds of computing scales. The offenses charged to the appellant are in large measure the sequence of the distribution to the trade by the appellee of circulars descriptive of its "Butcher's Scale" and obviously intended to show the benefits which would accrue to the users of them in selling butcher's goods to the public. One of such circulars was this:

"CAN YOU DO THIS?
ON YOUR SCALE

Buy 20 lbs. pork loins at 9c. a pound, retail them to your trade at the same price and get your money back.

WE CAN

on our scale and make you

3 PER CENT. PROFIT BESIDES.

If your business amounts to $10.00 a day sales WE CAN EARN YOU 30c. IN FRACTIONS YOU DON'T GET NOW. Thirty cents a day means you BUY THIS SCALE every 180 days. How long have you been in business? How many have you bought in that time? Think of it.

ONE SCALE LOST EVERY SIX MONTHS
LET OUR MAN PROVE THIS.

MONEYWEIGHT SCALE CO.,
47 STATE STREET, CHICAGO, ILL."

On the reverse side of this circular was a picture of the scale, and it was said of it that "it gives the butcher the odd fractions to which he is justly entitled. This feature alone in the average meat and produce market will not only save the cost of the scale in a short time, but in a large market will save the clerk's hire, which saving on the old pound and ounce scale is entirely lost." It is suggested by counsel for the appellee that this circular was put out by the Moneyweight Scale Co., of Chicago, and that this was an independent company for whose acts the appellee was not responsible. Both these companies were constituents of the Computing Scale Company of America, a corporation owning the entire capital stock of these and other companies. All the officers of these companies were directors of the combination, and the officers of the Moneyweight Company were officers of the appellee. The Moneyweight Co. was a selling agent of the appellee. Moreover, the proof leaves no doubt that the circular was sanctioned and approved by the appellee. After this circular had got into the hands of the dealers in com-

puting scales, the appellant, which was a rival manufacturer of computing scales, put out a circular headed "A Shameless Admission," which, after referring to the appellees' circular and scale, denounced them as dishonest and warned the dealers and the public of the alleged deceitful character of the appellee's scale, and sent its agents among the trade to disseminate this charge against the appellees' scale and method of doing business.

We do not need to go into the particulars. It is only necessary to say that the proof is amply sufficient to show that if the appellee's scales are not deceitful and fraudulent the conduct of the appellant was such as justly entitled the appellee to the injunction which the court ordered, or other appropriate remedy. If, on the other hand, the character of the appellee's scale and business was of the character charged, the injunction should not have been allowed, and this would be so on a ground quite independent of the merits of the appellant.

The circular of the appellee above set forth produces a strong impression upon our minds that the scales in question were designed for the purpose of enabling the users to impose upon the purchasing public by inducing the belief on the part of the latter that they were getting what they were paying for, when in fact they were not. If these scales realized to the butchers what is claimed for them, hey gained a distinct advantage over the ordinary method of weighing and fixing the price which the purchaser would understand to be the test of his bargain. He would have no understanding of the intricacies by which the result is reached. It is not intended that he will know. But he would doubtless suppose that in effect the result would be the same as in the familiar practice of weighing, and he depends upon the honesty of the scale and the man in charge of it to give him the equivalent of that effected by standard weights and measures. In fact, the opportunity which these scales give the user to deceive his purchaser in this regard is the very thing which the makers of them hold out as the attraction to the buyers of the scales. The alluring suggestion to the user that he has been wronging himself by using common methods of weighing is in itself a confession that the new method is designed to enable him to gain an advantage which he has hitherto been unable to enjoy.

That the appellee was not unwilling that the trade should accept the appellant's representations regarding their scales

is shown by a circular letter to their salesmen written soon after the distribution of the appellant's circular was commenced, which was as follows:

"To Our Salesmen:

"A circular has recently been sent out by the Toledo Company headed, 'A Shameless Admission.' They reproduced a small circular like the enclosed, which we sent out in some of our form letters. This circular, as you will notice, calls attention to the fact that we can save a merchant 3 per cent. by the use of our scales. Their circular will undoubtedly be sent into your territory. When you first see this you may be startled. We were startled when we saw it, for it always startles us to have the enemy take up our cause and do as much good as this circular is doing. We have labored many years trying to get the merchant to believe we were looking after his interests and save the fractions of a cent which belong to him. Our would-be competitor now comes along and endorses this proposition for us in such a manner that the most skeptical cannot doubt our claims. So far there have not been a great many of these circulars put out, but where we have heard from them we have reaped great results. * * * We hope they will flood the country with these before they wake up, for nothing in a long time has done us so much good."

And the truth seems to be that the scales fulfill in a substantial way the claim made for them. The bill informs us that during the four or five years since this particular kind of scale was invented, between fifty and six thousand of them have been sold in the United States. The testimony of the experts who are familiar with these scales confirms the claim of the appellee in respect to their advantage to the butcher. A demonstration of the operation of the scale made before us at the hearing confirms the belief that by its use the purchaser never gains, but the seller generally, possibly not always, gains over the results obtained by ordinary methods of weighing, and that this gain would be as much or more than three per cent., apparently considerably more.

The weight graduation is shown upon the scale by units of ounces. But the whole values are shown by graduations of two ounces, that is, for even numbered ounces, as 2, 4, 6 and 8 ounces, so that for every weight up to two ounces the price would be that for two ounces; for every weight from a little above two to four ounces the price would be the price of

four ounces, weight from a little above four to six ounces would be valued at six ounces, and so on.

This is effected by making the slit in the front of the cylinder wide enough to show the least two horizontal lines of total prices, graduated as above explained, by two ounce variations. Immediately on increasing the weight on the platform beyond even numbered ounces the lower line of total prices, showing the price for two ounces more, begins to appear and is very soon apparent. The agents of the appellee instructed the dealers that the lower line was the one to be read when both lines were visible. The appellee's circular to the trade says, "Let our man prove this," that is, how to use the scales in order to sell at cost and make the profit. And it would be the natural thing to expect that the user would read the lower line if he was inspired with the purpose of the manufacturer; but more than this, the eyes of the user would be fixed on the price per pound on the lower edge of the slit as his guide, and the lower total price would be the one next contiguous to it. Perhaps if the total price on the upper, or disappearing, line were read the profit might not be realized. This would depend upon the accuracy of the intrinsic organization of the scale about which we have no clear information.

No prices are shown for any weights between even ounces. And in use no such computations are made. The special advantage attributed to all computing scales is that they dispense with calculations, and show to the operator just what the whole value is. So that any person who can read figures is competent to use them. The appellee says in one of its circulars which is pointedly addressed to butchers: "Your Moneyweight Scale gives you the value, and you make no calculations, the single operation of weighing does the work; and as you are taught to place the same value upon your goods as you place upon your cash, it is hardly probable, when you realize that an ounce or two means, perhaps, that many cents that you will continue to give away." And in another circular they say of their computing scales in general: "This is the only absolutely automatic scale made, no counting or adding; put the goods on the platform and read the values in plain figures, a child can make no mistakes."

Alleged inaccuracies in the designation of whole prices by which they are made greater than they should be, even upon the scheme on which the scale is in fact constructed, are pointed out by counsel for appellant. But these are not so

clearly demonstrated by the present record as to justify a definite conclusion.

We should require the impression which we get of the appellee's scale, and the business of making and selling it from its circulars and instructions, to be removed before we could sanction the employment of the process of the court in its protection. As the proof, so far, only serves to deepen it, we must, therefore, reverse the order granting the injunction, and direct that the cause be proceeded with in due course.

It is so ordered.

3236

3237

2117

My Best Friend

"The greatest money-making fixture in my store is the TOLEDO HONEST WEIGHT SPRINGLESS SCALE.

"All that customers want is a square deal. If they pay for sixteen ounces they want sixteen ounces. Over-weight means loss of goods—short-weight means loss of customers. THE TOLEDO SCALE has stopped those losses in my store. It is automatic, quick in operation, easily read and CONTAINS NO SPRINGS.

"Everybody knows that spring scales are unreliable. That's the reason why I discarded my spring scale.

"No man who is looking for all of the profits to which he is entitled can afford to be without a Toledo Scale.

"It is my best friend because it satisfies my customers and prevents losses. It has brought me many new customers.

"I bought my Toledo Scale on small monthly payments, and it had more than paid for itself before I made the last payment.

"It was a lucky day for me when I mailed that card to the Toledo Company. They sent me a booklet which gave me more information about scales than I had ever known."

MR. RETAIL DEALER: Sending the card will not obligate you in any way. Get the information and then decide for yourself. Be sure to mail the card today!

Toledo Computing Scale Company

Makers of Honest Scales — Toledo, Ohio, U. S. A.

Canadian Factory, Windsor, Ont.

Seventy-two Styles and Sizes
Prices, $30 and upward
Liberal allowance for your old scale
Easy Monthly Payments

The Toledo Scale is the recognized leader of the world

3238

4119

Your Customer - Your Greatest Asset

No. 341 Electric
Merchant's Size

Powerful Trade-Bringers

These New Toledo Electric Scales are powerful trade-bringers. The commodity is placed on the platter, the customer sees brilliantly lighted the exact weight of his purchase, and the Electric Sign flashes the Great Trade-bringing Slogan

TOLEDO ELECTRIC
MORE GOES IN WEIGHT—NO SCRIMPING

Your Customers your Greatest Asset

The Advertising value of the Customer-pleasing and Trade-bringing features of these attractive Toledo Electric Scales cannot be over-estimated.

No store is too dark for these scales—the darker the store the brighter they shine.

If you have a Computing Scale, and would like to have a new Toledo Electric Scale, write on post card the kind of scale you own, and we will inform you how to dispose of your scale at a fair valuation.

No. 456 Electric
Customer's Side

3239
2121

The Significance of the Famous Sign

It is an unusual sign. But there is a reason for it. You will be interested in its history.

The Toledo is the original Springless Automatic Scale. Before it was invented the only automatic scales in use were spring scales. One maker of spring scales had placed on the market something like sixty thousand fossil-shaped computing spring scales. As there were, at that time, no laws requiring the inspection of the computed values on scales, these sixty thousand spring scales were cunningly made so as to systematically give short weight. And this shortweighting feature was advertised as "A Special Advantage." They stated that with their scales a retail dealer could sell goods at the same price per pound he paid for them and still make 3% profit.

The Toledo Computing Scale Company faced the alternative of making a dishonest scale to compete with those dishonest spring scales, or of making an honest scale, and exposing the dishonest ones.

The Toledo Company chose the latter course, the only one open to a reputable company, and boldly placed upon its scales the significant sign:

"Toledo—No Springs—Honest Weight"

which has now become famous as the greatest trade-bringing sign ever displayed in a retail store.

UNBIASED STATEMENTS BY THE HIGHEST AUTHORITIES

ENCYCLOPEDIA

The New International Encyclopedia, Vol. 17, page 617, says: "Spring scales are not as accurate as balance scales," and in Vol. 16, page 109, says: "The force of the spring varies with the temperature, which alters the length and elasticity of the wire and renders impossible precise measurements."

Nelson's Encyclopedia, Vol. 1, page 938, says: "The spring balance becomes unreliable when frequently used."

ENCYCLOPEDIA

Chamber's Encyclopedia, Vol. 1, page 670, says: "Spring scales are made in many forms, but the principle of all is the same—the stretching of a spiral spring, and they have no pretension as to great accuracy."

The Encyclopedia Britannica, ninth edition, Vol. 3, page 261, says: "Spring balances are very extensively used for weighing out the CHEAPER articles of commerce and other purposes where a high degree of precision is NOT required."

The Cost of Eating

It is the high cost of eating that is troubling the fathers and mothers of this country.

42 cents out of every dollar earned by the average family is spent for food—More than is spent for all other necessaries of life.

In this connection have you given the question of Scales any thought?

One hundred and five thousand grocers and butchers have considered this question and are now protecting their customers and attracting new ones to their stores by using Toledo Springless Scales, which guarantee Honest Weight. They are the scales which bear the Significant and Famous Sign:

"Toledo—No Springs—Honest Weight"

Some scales are not right and the public knows it. Customers lack confidence in spring scales. Changes in temperature affect them. They are seldom in balance. Wise merchants are discarding them.

The scale is the only fixture in your store in which all customers are financially interested. They have a right to know that it is right. It measures the amount of goods they get for their money. Your customers are your greatest asset. Why not please them and attract new ones by using the scale which everybody knows gives honest weight?

The Toledo Springless Automatic Scale deals justly on both sides of the counter. It will get for you every cent to which you are entitled. It will give your customers every ounce due them. It will increase your trade and add to your profits.

It stops overweight—loss of goods.
It stops shortweight—loss of customers.
It contains no springs, and is always reliable.
Its superiority is universally recognized.

Seventy-two styles and sizes. Prices $40 and upward. A better scale for the money than you can get from any other source. Liberal allowance for your old scale and easy monthly payments. Illustrated pamphlet free to retail dealers upon request.

Toledo Computing Scale Company

MAKERS OF HONEST SCALES **TOLEDO, OHIO, U. S. A.**

Canadian Factory, Windsor, Ont.
British Factory, Birmingham, England.
Branch Offices and Display Rooms in all Large Cities.

3:241
2125

YOU WANT MORE CUSTOMERS

Sign and mail this card today and we will show you how to get them

---

Date .....

Name .....

Business .....

Street ..... *City* .....

County ..... *State* .....

POST-CARD

ONE CENT STAMP HERE

Toledo Computing Scale Co.,

Makers of Honest Scales,

TOLEDO,

OHIO.

The Cost of Eating

Do you know that 42½ cents out of every dollar earned by the average family is spent for food? Think of it!

In this connection, have you given the question of scales any thought?

One hundred and thirty thousand grocers and butchers are protecting their customers by using Toledo Scales, which guarantee correct weight.

When buying your provisions look for the Scales with the Sign

TOLEDO

No Springs — Honest Weight

TOLEDO SCALE COMPANY

Makers of Honest Scales

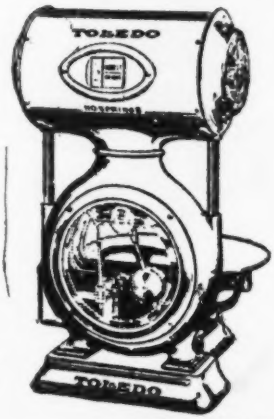
Toledo, Ohio U. S. A.

Canadian Factory, Windsor, Ontario

3243
2129

BANNER
2

Honest Weight
GUARANTEED

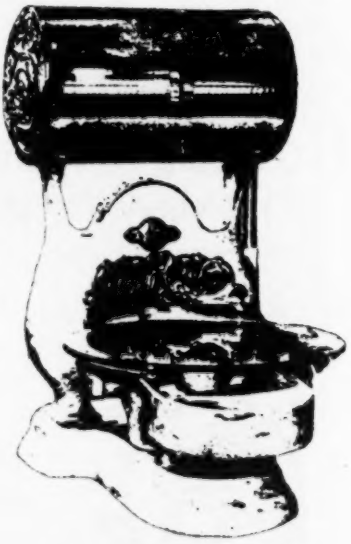


Dy Ex 49.

In
this
store

WE USE THE
TOLEDO SYSTEM
FOR WEIGHING
ALWAYS ACCURATE NO SPRINGS

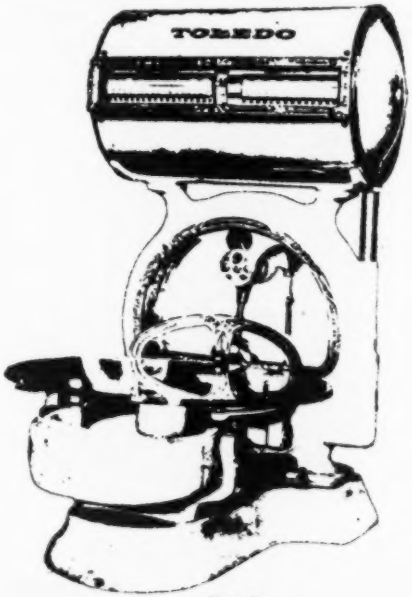
FEAON BROTHERS
HARBOR BUFFET, • NEWFOUNDLAND



-No. 300-

This scale has a pendulum housing, cylinder casing and a base carrying standards supporting the scale beam which in turn supports a platter upon upturned pivots inwardly of its fulcrum pivots. The scale beam is weighted at its outer end and at the inner end is forked, one tine connecting with the pendulum mechanism, and the other connecting with the rack and pinion to rotate the cylinder. The cylinder is mounted on disc bearings in the elevated casing above and to the rear of the platter and directly above the pendulum mechanism, which is enclosed in the central housing. The pendulum mechanism comprises a weighted stem projecting from a hub formed with knife edge pivots supported in bearings carried by the housing, and an adjustable cam is rotatably mounted on the hub and carries a flexible link whereby connection is made to the scale beam. Secured in the base is a dash-pot having an enlarged chamber at its upper extremity and a lip or nipple extending downwardly from the cover and loosely surrounding the piston rod, the piston being connected to the moving scale beam and tending to damp the vibratory movement of the moving parts of the scale. If desired, an auxiliary or tare beam was carried by the scale beam.

No. 344 - same as #300 except for minor detail changes, as change in adjustment of flexible metal link and rack bar.



-No. 346-

Same mechanism as in No. 300, but as the pendulum mechanism is exposed through openings in housing, the mechanism must be more highly polished and finished. The housing is of more pleasing contour. The ornamental casing ends of the No. 300 have been replaced by plain ends with brass scrolls, and the casing is supported upon a saddle resting upon the upwardly-extending arms of the housing. The later #346 scales were also equipped with means for raising the cylinder away from its bearings and holding same in raised position during shipment. Capacity 20 lbs.

#346 - same as #345 but with chart capacity of 24 lbs.

#347 - " " " " " " " " 20 lbs. and different price ranges.

#348 - " " " " " " " " 16 lbs.

#883 - " " " " " " " " 30 lbs., and the center of the cylinder is raised 4 inches higher than in regular cylinder scale.

Offered and Def Ex 52, but not admitted

3246

2135

-NO. 81-

Def Ex 52

Same mechanism as in improved 345 style, but as mechanism was enclosed, it did not need high polishing or finishing. Housing similar to #300 but with plain metal ends without scrolls. Also a saddle was introduced between casing and arms of housing that simplified machine work and assembly. The pendulum dover was also enlarged and made seperate from the housing. Finished in olive green only. If desired, an auxiliary or tare beam was carried by the scale beam.

#82 - same as #81, chart capacity 24 lbs.

#83 - " " " " " " 20 lbs., with different price range.

#84 - same as #81, chart capacity 15 lbs.

These style numbers were changed after July, 1910, when #81 was made to include all four of the above-mentioned styles. Then #82 was same as #81 with cylinder 4 inches higher than regular cylinder.

#83 - same as #81 with different shaped casing and special equipment for electrically illuminating the chart, the scale beam having an insulating pin normally holding open a circuit-closing lever which completed the circuit whenever a commodity was placed on the platter, the lamps being contained in box-like superstructures about the cylinder and having transparent signs at front and rear.

#84 - same as #82 with electric equipment.

#85 - same as #81 with smaller cylinder and lesser chart capacity.

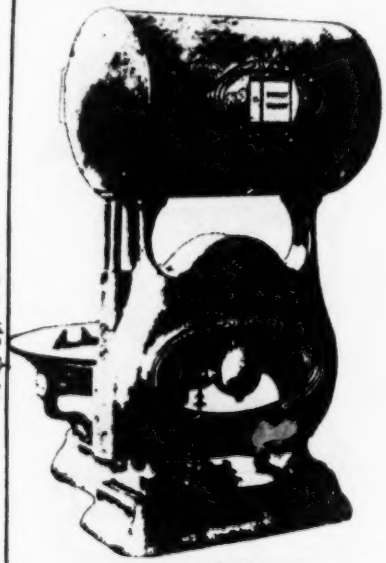
#86 - same as #82 with smaller cylinder.

#87 - same as #85 with electric equipment.

#88 - same as #86 with electric equipment.

Offered with Dyf Gr 5-3 but not adopted

-No. 181-



Dyf. Gr. 53.

Dyf. 4.53.

Same mechanism as in the improved #346 style, but as mechanism was exposed to customer through opening in rear of scale, mechanism was highly polished. The housing was similar in contour to the #81, but the trimmings were in nickel and the scale was finished in gold as well as blue and green. If desired, an auxiliary or tare beam was carried by the scale beam.

#182 - same as #181, chart capacity 24 lbs.

#183 - " " " " " 20 lbs., different price range.

#184 - same as #181, chart capacity 15 lbs.

#185 - same mechanism as #181, with 30 lbs. gross, tare and net weight chart similar to that used in #349.

#186 - same as #185, chart capacity 60 lbs., gross, tare and net weight chart similar to that used in #350.

#187 - same as #185, with 20 lbs. gross, tare and net weight chart similar to that used in #351.

These style numbers were changed after July, 1910, when #181 was made to include #181 - #184 included above. Then #182 was same as #181 with cylinder 4 inches higher than regular cylinder.

#183 - same as #181 with different shaped casing and special equipment for electrically illuminating the chart, the scale beam having an insulating pin normally holding open a circuit-closing lever which completed the circuit whenever a commodity was placed on the platter, the lamps being contained in box-like superstructures about the cylinder and having transparent signs at front and rear.

#184 - same as #182 with electric equipment.

#186 - same as #181 with smaller cylinder and lesser chart capacity.

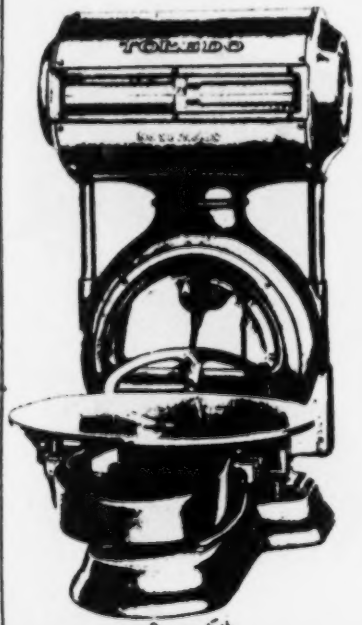
#186 - same as #182 with smaller cylinder.

#187 - same as #185 with electric equipment.

#188 - same as #186 with electric equipment.

3247
2137

Offered with Def's Ex. but not admitted



Def. Ex. 54.

Def. 54

-No. 501-

THE FINEST NON-ELECTRIC CYLINDER SCALE

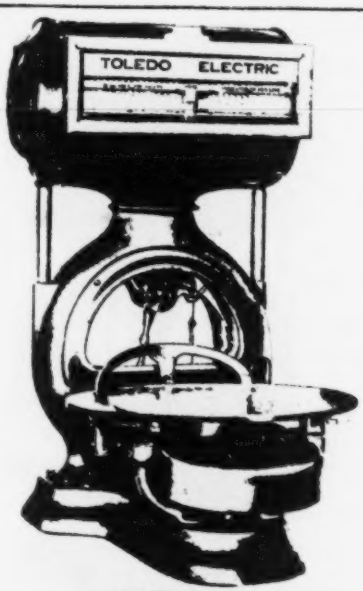
Same mechanism as in improved #345 with hand, pendulum and chart mechanism visible to customer and merchant, requiring all parts to be handsomely finished. Chart shaft revolves on visible ilco bearings showing through plate glass casing ends. New design of housing employed with central neck and side pillars supporting the saddle for the casing and with front and rear openings covered with beveled plate glass. The pendulum construction was formed with a laterally enlarged hub transverrely bored and having an arbor extending through the bore with a cut-out center, the knife pivot extending longitudinally of the arbor within the sector and with its ends extending on each side of the hub, means being employed for clamping the knife pivot in the arbor. The adjustment of the pendulum saw was also arranged with a pair of cheeks on opposite sides of the pivot, adjusting screws being threaded in the hub and contacting the cheeks to swing the cam around the pivot. Also a shock-absorbing connection was provided between the scale beam and the rack rod whereby the chart mechanism was relieved of all shocks due to dropping of commodities on platter, etc. In 1911 this scale was also equipped with shipping pins whereby the scale beam was raised from its bearings during shipment, the standards and housing, as well as the scale beam, being provided with carefully positioned openings to co-operate with the shipping pins in maintaining the beam in raised position. The connection of the scale beam with the pendulum was improved by providing a stirrup co-operating with a cone pivot on the beam, with an adjustable pin arranged to prevent the pivot from jumping out of the stirrup.

#344 - same as #301, cylinder 4 inches higher than regular cylinder.

#345 - same as #301, smaller cylinder.

#346 - same as #301, smaller cylinder.

#396 - same as #301, smaller casing and lesser chart capacity.

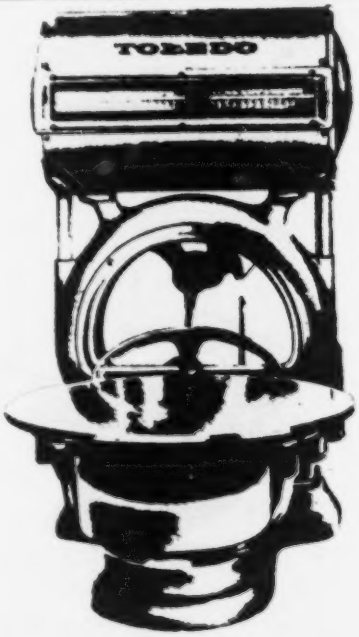


-NO. 383-

ONE PIECE, ELECTRIC CYLINDER SCALE

Has all the improvements and advantages of the #381 and in addition is equipped with a different style casing with colored signs, and electric lights automatically illuminate the chart and signs when a commodity is being weighed. At first the electric switch mechanism of the #83 was employed with the lever circuit-closing member, but later the switch mechanism was changed to include a resilient ribbon member with an insulated pin normally contacting with an arm carried by the pendulum so as to normally maintain the circuit open, the circuit being closed upon movement of the pendulum when a commodity is placed upon the platter. If desired, an auxiliary or tare beam was carried by the scale beam.

#384 - same as #383, with cylinder raised 4 inches above regular cylinder.
#387 - same as #383, smaller cylinder.
#386 - same as #384, smaller cylinder.
#397 - same as #383, with smaller casing and lesser chart capacity.



-No. 381-

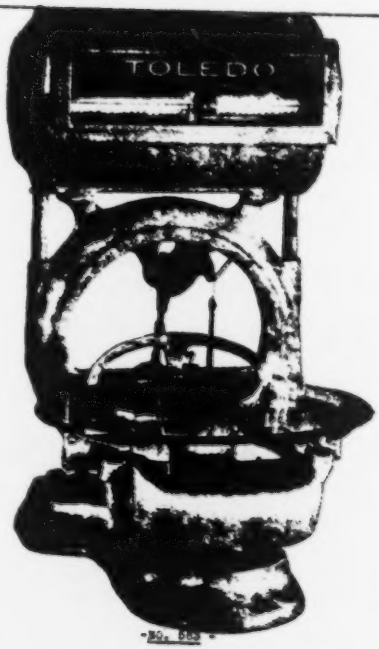
Like #340 but with more symmetrical style of housing and with many structural advantages of the #381 construction. The mechanism of the #381 was changed at substantially the same time as was that of the #381. The scrolls are plain and are finished in the same color as the body of the scale. Ordinary sheet glass was used to cover the openings. The casing was closed by plain metal ends without scrolls. Oval glass platter. Can be equipped with tare beam if desired.

#344 - same as #341, smaller cylinder.

#346 - same as #341, smaller casing and lesser chart capacity.

3:251

2145



-No. 8A-

The electric scale of the #681 series, having all the advantages of the #681 and being equipped with a different shaped casing with electric lights to automatically illuminate the chart and signs when a commodity is being weighed, the mechanism for automatically illuminating the lamps being substantially in accordance with that used in the #383.

#687 - same as #683, smaller cylinder.

#697 - same as #683, smaller casing and lesser chart capacity.

3252

DEF. EX. 64.

2—391

DEPARTMENT OF THE INTERIOR,

United States Patent Office.

To all persons to whom these presents shall come, Greeting:

This Is to Certify that the annexed is a true copy from the records of this office of an instrument of writing

Recorded September 5, 1901,

in

Liber X-63, page 39.

Said record has been carefully compared with the original and is a correct transcript of the whole thereof.

In Testimony Whereof I have hereunto set my hand and caused the seal of the Patent Office to be affixed at the City of Washington, this 10th day of April, in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the United States of America the one hundred and forty-first.

F. W. H. CLAY,
Acting Commissioner of Patents.

(Seal)
Liber X-63
Page 39

Whereas Allen DeVilbiss Jr., a citizen of the United States, and now residing at 737 West Washington Street, in the City of Toledo, Lucas County, Ohio, is the inventor of certain improvements in Computing Scales and devices relative thereto, as covered in the United States Patents and Applications hereinafter referred to; and

Whereas The DeVilbiss Computing Scales Company, a corporation organized under the laws of the State of Ohio, and now doing business at the corner of Albion and Bishop Streets in said City of Toledo, has from time to time obtained the right, title and interest in said patents and applications by means of divers assignments on record in the United States Patent Office; and

Whereas Toledo Scale and Cash Register Company, a corporation organized under the laws of the State of New Jersey, and having its principal office at No. 20 Bruin-street, Newark, New Jersey, is desirous of obtaining an interest in the patents and applications hereinafter referred to; and

Whereas The DeVilbiss Computing Scale Company hereby acknowledges receipt from said Toledo Scale and Cash Register Company of One Dollar ($1.00) and other valuable considerations, in payment in full for the transfer made by this instrument;

Now Therefore, The DeVilbiss Computing Scale Company aforesaid, through the officer whose signature is attached, and with the concurrence of the officers who witness this indenture, hereby assigns unto said Toledo Scale and Cash Register Company aforesaid, the entire right, title and interest in and to the inventions of said Allen DeVilbiss Jr. aforesaid, disclosed in the United States Patents and Applications enumerated in the following paragraphs, in each of which is given the Attorney's letter or docket number, the issue or filing date, the patent or serial number, the date of assignment from said Allen DeVilbiss Jr. to The DeVilbiss Computing Scale Company, and the Liber and page in the Transfer of Patents where said assignment is recorded; to-wit:

Case A, issued March 14, 1899, Patent No. 621,297, assigned Nov. 10, 1899, recorded in P 60, page 217;

Case B, issued May 22, 1900, Patent No. 649,915, assigned Nov. 10, 1899, recorded in Liber W 59, page 425;

Case H, issued July 31, 1900, Patent No. 655,147, assigned May 4, 1899, recorded in Liber L 60, page 388;

Case N, Filed May 21, 1900, Serial No. 17,411, assigned June 9, 1900, and recorded in Liber O 61, page 181;

Case S, issued Feb. 5, 1901, Patent No. 667,652, assigned Oct. 10, 1900, recorded in Liber C 62, page 82;

Case W, issued May 21, 1901, Patent No. 674646, assigned Sept. 22, 1900, recorded in Liber A 62, page 49;

Case Y, Filed Sept. 20, 1900, Serial No. 30,640, Allowed Apr. 3, 1901, Assigned Sept. 24, 1900, recorded in Liber A 62, page 49;

Case 27, Filed Jan. 21, 1901, Serial No. 44,132, Allowed March 14, 1901, assigned April 1, 1901, recorded in Liber Q 62, page 272;

Case 33, Filed April 9, 1901, Serial No. 55,007, assigned July 17, 1901, recorded in Liber .....

In Testimony Whereof The DeVilbiss Computing Scale

Company has affixed hereto its signature and corporate seal, through Lewis Rakestraw, its secretary and treasurer, in presence of Florentine Montgomery Rakestraw, its president, and of Allen DeVilbiss Jr., its vice-president, in said City of Toledo, this fifteenth day of July, 1900.

THE DE VILBISS COMPUTING SCALE COMPANY.
per LOUIS WATSON RAKESTRAW.
Its Secretary and Treasurer.

The DeVilbiss Computing Scale Company Seal, Toledo, O.

Witnesses:
FLORENTINE MONTGOMERY RAKESTRAW
President.
ALLEN DE VILBISS JR.
Vice President.

In Testimony of the acceptance of this assignment, said Toledo Scale and Cash Register Company has affixed hereto its signature and corporate seal, through ..... its ..... this ..... day of ..... 1901.

per .....
its .....

The State of Ohio, } ss.
County of Lucas, }

Before me, a Notary Public, in and for said County and State, on this twenty-sixth day of July, 1901, personally appeared The DeVilbiss Computing Scale Company, by Lewis Watson Rakestraw, its secretary and treasurer, Florentine Montgomery Rakestraw, its president, and Allen DeVilbiss Jr., its vice-president, all personally known to me to be the persons described in the foregoing instrument, who severally signed the said instrument in my presence and acknowledged the same to be its and their free act and deed.

In witness whereof I have hereunto set my hand and official seal.

Notarial Seal.
Lucas Co.,
Ohio.

FREDERICK LYMAN GEDDES.
Notary Public in and for Lucas County, Ohio.

UNITED STATES OF AMERICA,

The State of .....,
County of ..... } ss.

Before me, a Notary Public in and for said County and State, on this ..... day of ....., 1901, personally appeared Toledo Scale and Cash Register Company, by ....., its ....., to me personally known to be the person described in the foregoing instrument, who signed the said instrument, in my presence, and acknowledged the same to be its and his free act and deed.

In Witness Whereof I have hereunto set my hand and official seal.

.....
Notary Public in and for ..... County, ...

Recorded September 5th, 1901.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 2150, inclusive, contain a true copy of the printed record, printed under my supervision, and filed on the first day of October, 1920, on which these causes were heard and determined, in the cases of

The Computing Scale Company

vs

Toledo Computing Scale Company

and

Toledo Computing Scale Company

vs

The Computing Scale Company

Nos. 2777 and 2784, respectively, October Term, 1919, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this twenty-third day of November, A. D. 1921.

(Seal)

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

3258

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court room in the city of Chicago in said Seventh Circuit on the seventh day of October 1919, of the October term in the year of our Lord one thousand nine hundred and nineteen and of our Independence the one hundred ad forty-fourth.

And afterwards, to-wit: On the twenty-eighth day of November, 1919, in the October term last aforesaid, came the appellant, by its counsel, Mr. Edward Rector and Mr. Albert H. Meads, and filed in the office of the clerk of this court their appearance, which appearance is in the words and figures following, to-wit: Appearance filed 1921

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 2784. October Term, 1919.

Toledo Computing Scale Co.,
Appellant,

vs.

The Computing Scale Co.,
Appellee.

The Clerk will enter my appearance as counsel for the appellant.

EDWARD RECTOR,
ALBERT H. MEADS.

Endorsed: Filed Nov. 28, 1919. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the tenth day of December, 1919, in the October term last aforesaid, there was filed in the office of the clerk of this court a certain Certificate of the Clerk of the District Court to Exhibits, which said Certificate is in the words and figures following, to-wit:

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0, 1919.

United States of America
Northern District of Illinois } ss.
Eastern Division.

I, John H. R. Jamar, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify that I herewith transmit to the United States Circuit Court of Appeals for the Seventh Circuit, certain original exhibits in the case entitled The Computing Scale Company vs. Toledo Computing Scale Company, Equity No. 30024, said exhibits are marked as follows, to-wit:

Plaintiff's Exhibits 2, 3, 4, 5, 6, 7, 41, 42, 43, 57, 66, 67, 68, 69, 70, 71, 72, 73, 74, 77, 78, 79, 80,

Plaintiff's Exhibit 40.

Defendant's Exhibits 21, 22, 23, 26, 27, 61,

Defendant's Exhibits 28 to 34 inclusive, 37 to 49 inclusive, 50 to 54 inclusive, 56, 57, 58, 59, 64.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in the City of Chicago, this 10th day of December, 1919.

JOHN H. R. JAMAR,
(Seal) *Clerk.*

Endorsed: Filed Dec. 10, 1919. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the twentieth day of December, 1919, in the October term last aforesaid, came the appellee, by its counsel, Mr. Charles F. Morse and Mr. John M. Zane, and filed in the office of the clerk of this court their appearance, which appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

Filed 191

For the Seventh Circuit.

No. 2784.

October Term, 1919.

Toledo Computing Scale Co.,
Appellant,

vs.

The Computing Scale Co.,
Appellee.

The Clerk will enter my appearance as counsel for the Appellee.

CHARLES F. MORSE,
JOHN M. ZANE.

Endorsed: Filed Dec. 20, 1919. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the ninth day of January, 1920, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

1920. Friday, January 9, 1920.

Court met pursuant to adjournment and was opened by proclamation of crier.
Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

Before:

Hon. Evan A. Evans, Circuit Judge.

The Toledo Computing Scale Company
2777 *vs.*
The Computing Scale Company
The Computing Scale Company
2784 *vs.*
Toledo Computing Scale Company

Appeals from the District Court of the United States for the Northern District of Illinois, Eastern Division.

In the above entitled causes, it appearing that the first entitled cause is an appeal and the second entitled cause is a cross appeal from the same decree of the lower court, it is ordered that the said appeals be heard for argument and submission at the same time, and that The Computing Scale Company may file upon both of said appeals for said hearing one brief, which shall be a brief in reply to the Toledo Computing Scale Company's brief upon its appeal and also a brief upon the errors assigned by The Computing Scale Company upon its cross appeal that the Toledo Computing Scale Company shall first file its brief upon its said appeal, and thereafter The Computing Scale Company shall file its brief in reply, containing also its brief upon its cross appeal, and that thereafter the Toledo Computing Scale Company shall file its reply brief, all briefs to be filed within the times fixed by the rules of this court or such extensions thereof as may be granted by the court, and that upon the consolidated hearing of said appeal, The Computing Scale Company shall be entitled, as provided by the rules of this court, to the opening and closing of the argument as the complainant in the court below, from which said appeals are taken, and that both said

appeals shall be heard upon the same printed record containing the transcript on both of said appeals.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court room in the city of Chicago, in said Seventh Circuit on the fifth day of October 1920, of the October term in the year of our Lord one thousand nine hundred and twenty and of our Independence the one hundred and forty-fifth.

And afterwards, to-wit: On the fourth day of January, 1921, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit: Order Jan.

Tuesday, January 4, 1921.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

Toledo Computing Scale Co. } Appeal from the District Court
2784 *vs* } of the United States for the
The Computing Scale Co. } Northern District of Illinois, Eastern Division.

It is ordered by the court that this cause be, and the same is hereby set down for hearing on February 4, 1921.

And afterwards, to-wit: On the fourth day of February, 1921, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

of 1921. Friday, February 4, 1921.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

Before:

Hon. Francis E. Baker, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.

Toledo Computing Scale Company
2784 *vs.*
The Computing Scale Company
} Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Edward Rector and Mr. Frederick P. Fish, counsel for appellant, and by Mr. John M. Zane, counsel for appellee, and the court having heard the same takes this matter under advisement.

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of 4, 1921. Toledo Computing Scale Company
2784 *vs.*
The Computing Scale Company
} Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the court that the appellee in this cause may file a reply brief in this cause within twenty (20) days from this date.

And afterwards, to-wit: On the sixteenth day of March, 1921, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit: Order Mar.

Wednesday, March 16, 1921.

Court met pursuant to adjournment.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.

Before:

Hon. Francis E. Baker, Presiding Judge.

Toledo Computing Scale Company
2784 *vs.*
The Computing Scale Company

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

On application of Edward Rector, counsel for appellant, it is ordered that appellant may file answer to appellee's reply brief in this cause instanter, and that appellee may file a reply thereto by April 15, 1921.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court room in the city of Chicago, in said Seventh Circuit on the fourth day of October 1921, of the October term in the year of our Lord one thousand nine hundred and twenty-one and of our Independence the one hundred and forty-sixth.

And afterwards, to-wit: On the fourth day of October, 1921, in the October term last aforesaid, there was filed in the office of the clerk of this court the Opinion of the court, which said Opinion is in the words and figures following, to-wit:

3206

filed
. 1921.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Nos. 2777 and 2784. October Term and Session, 1921.

No. 2777.
The Computing Scale Company,
Appellant,
vs.
Toledo Computing Scale Company,
Appellee.

No. 2784.
Toledo Computing Scale Company,
Appellant,
vs.
The Computing Scale Company,
Appellee.

Appeal and Cross Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Before BAKER, ALSCHULER and EVANS, *Circuit Judges.*

In Toledo Computing Scale Co. v. Computing Scale Co., 208 Fed. 410, appellee's bill was based on claims 5 and 6 of reissue patent 11,536 and on patent 597,300, and the District Court sustained both patents and entered a decree of injunction and an order of accounting for profits and damages. On appeal we held that patent 597,300 was void, and that reissue 11,536, was valid and infringed, but that there was imperfect proof of complainant's title to that patent. We accordingly reversed the decree and remanded the cause with directions to dismiss the bill as to patent 597,300 and "to permit complainant to introduce proof of title to reissue 11,536." On the remandment the District Court found that complainant had good title to reissue 11,536, and thereafter on May 4, 1914, reentered the original decree as to that patent, except that, the patent having expired in the meantime, the command to cease infringing was omitted.

Both parties are now appealing from a decree that confirms the master's report on the accounting and directs defendant

to pay complainant $404,101.97 with interest from the filing of the report; and defendant's first contention is that the present money decree of March 5, 1919, and the merits decree of May 4, 1914, should both be reversed with the direction to dismiss the bill for insufficient proofs of title.

In our findings of fact respecting the merits of reissue 11,536, we rejected the Phinney patent 106,869, issued in 1870, as an alleged anticipation. Subsequently defendant filed in this court a petition in the nature of a bill of review to open the decree in order to let defendant prove that Phinney had done more for the art in commercial practice than he had disclosed in his patent. This petition we denied because defendant by the exercise of reasonable diligence could easily have brought the alleged new facts into the original hearing of the merits.

Defendant now insists that, on its proofs offered to the master and embodied in the record concerning Phinney's commercial practice, we should reverse our denial of the petition to re-open the case on the merits, should reverse our decree of 1913 and should reverse the District Court's decrees of 1914 and 1919 with the direction to dismiss the bill.

Alleged errors of the master against defendant are thus specified in the principal brief:

"His award to the plaintiff, as the profits derived by the defendant from the manufacture and sale of its infringing scales, constituting less than one-half of its entire business during the infringing period, of a sum approximating four times the amount of profits which it made on its entire business during said period.

"His failure to apportion, or to make any effort to apportion, the profits which he held to have been derived by defendant from the manufacture and sale of the infringing scales between the patented feature of the scale, constituting but a single element of it, and the remainder of the scale.

"His failure to give any consideration to the fact that except in respect to its employment of the light cylinder or drum defendant's scale was of a radically different type from the patented scale, and embodied numerous valuable and patented improvements, the property of the defendant, which it had acquired at great expense and which contributed largely to the utility and salability of its scales.

"His award to plaintiff of the entire profits which he

held to have been derived by defendant from its manufacture and sale of the infringing scales, including clearly and readily segregable profits derived from wholly independent attachments, such as the automatic electric lighting device.

"His award to plaintiff of the entire profits which he found to have been made by defendant not only upon its cylinder scales employing cylinders or drums having skeleton frames made "of light material," as required by the claims of the patent in suit, but its scales employing cylinders or drums having their skeleton frames made of steel, one of the heaviest of materials.

"His refusal to consider the several standards of comparison presented by the record, and to award to plaintiff merely the profits derived by defendant from the manufacture and sale of scales employing the cylinders or drums which it did employ as compared with the profits which it would have made by employing other cylinders or drums, open and free for its use, and capable of serving the same purpose."

Complainant's assignemts of error go to the master's allowance of interest on defendant's investment; this disallowance of defendant's profits on Canadian sales; his refusal to charge defendant with the full nominal selling price when secondhand scales were taken as part payment and his charging defendant with only the cash received for new scales plus the amounts realized from secondhand scales; his refusal to include in the accounting of profits the scales on hand but unsold at the end of the accounting period; and his refusal to allow anything against defendant for the good will of defendant's business as it stood at the end of the accounting period.

As a basis for considering these assignments and cross-assignments of error, we set out the master's very full and painstaking report:

FINDINGS OF FACT.

Description of the parties and the business of the Toledo Scale Company.

The plaintiff, Computing Scale Company, the owner of Reissued Letters Patent No. 11,536, the patent in suit, is a corporation engaged in the business of manufacturing and sell-

ing computing scales under said re-issued patent at Dayton, Ohio, and is sometimes referred to as the Dayton Company.

The defendant, Toledo Computing Scale Company, now the Toledo Scale Company, hereinafter called the Toledo Company, is a corporation engaged in the business of manufacturing and selling computing scales at Toledo, Ohio, and in the course of its business infringed Claims 5 and 6 of the patent in suit, as held by the Circuit Court of Appeals of this circuit in Toledo Computing Scale Company v. Computing Scale Company, reported in 208 Fed. 410.

The infringing or accounting period begins about the 1st day of October, 1906, when the defendant began making and selling the infringing scale, and ends on the 3rd day of September, 1912, when the patent expired.

When the Toledo Company began to manufacture and sell infringing scales, hereinafter called cylinder scales, it was conducting a large, well established business in manufacturing and selling computing pendulum fan scales. The fan scale shows weight and value by means of an indicator index-hand carrying prices per pound moving back and forth across a fan shaped dial, carrying on its face value and weight graduations. At this time defendant had its factory at Toledo and a built up organization for making and selling fan scales, and after it began to make and sell the infringing scale it continued in the same factory under the same organization to manufacture and sell both fan and cylinder scales.

The fan scale and cylinder scale business were carried on as a single business. The material used in manufacture of fan scales and cylinder scales was drawn from the same stock. The same men worked on both kinds of scales. The same salesmen sold both kinds of scales. The overhead expenses applied to both kinds of scales. The books of account and records of the company were not kept with a view to separate costs, expenses or profits as between the two kinds of scales made and sold. Obviously the cost of making and selling cylinder scales cannot be accurately determined, but by making use of percentages and apportionments costs and profits may be found with reasonable certainty.

Salesmen of the Toledo Company in making sales sometimes accepted second-hand scales from customers in part payment of the purchase price on sales of cylinder scales. Until in 1909 these allowances were carried in one account as "Exchange Scales." From the beginning of 1909 there

were two accounts, "Toledo Scale Allowances" and "Exchange Scales." Toledo Scale Allowances were scales of defendant's own make taken in part payment in exchange. Exchange Scales were scales of other makes taken in part payment in exchange. The plaintiff claims that in this accounting the defendant should be charged the full selling price of cylinder scales regardless of the fact that a portion of that price might have been paid by another scale taken in exchange. This claim has not been accepted.

The scales taken in as part payment were not all handled in the same manner. Some were destroyed entirely, others were fixed up, and sold as second-hand scales, and the account stated in this report includes second-hand scales, as well as new scales, and the profit or loss on second-hand scales has been treated the same as profit or loss on new cylinder scales.

In addition to allowances for exchange scales, special allowances, or deductions from the purchase price, were made for one reason or another. It might be on account of marring or to place a scale in some advantageous place or otherwise.

After a scale was sold and the sale entered on the books as a credit to the new sales account it might happen that the scale would never be delivered, or it might be repossessed by the Toledo Company for failure to pay an installment or for some other reason. For such transaction prior to 1909 there was one account on the defendant's books and it was in the form of debits to sales. During the year 1909 a new account was opened called "Chargebacks" but the old method of debiting sales also continued in force to some extent. Both accounts are called chargebacks by the witnesses testifying on that subject. These chargebacks reduced the credits to sales to the extent of such chargebacks and the purchaser in such case forfeited whatever payment or installments he had made on the scale. The repossessed scale was refinished or rebuilt and sold over again as a new scale and was handled the same as if it had not been the subject of a previous sale.

Resident salesmen and traveling salesmen sold defendant's scales. In some large cities the defendant maintained branch offices with resident salesmen; outside of such large cities scales were sold by travelling salesmen.

Salesmen of the Toledo Company received a commission on sales made by them as compensation for their services. In making sales agents were permitted to make an allowance

of a stated amount on certain scales taken in part payment for new scales, but the salesman did not receive any commission on the amount so allowed for the exchange scale. Agents sometimes allowed a greater amount for an exchange scale than was permitted by the company and sometimes made other allowances to the purchaser. Such excess allowance the agent had to stand and the amount was charged against commissions in the Commission Account and was credited to the customer in his account.

The chargebacks, allowances and commissions above mentioned are an important element in the account to be stated and the manner of handling them has been a matter of controversy between the parties to this suit.

Before the taking of testimony began, on motion of the plaintiff, the Master entered an order directing the defendant to prepare and file with the Master an account in accordance with federal equity rule 63, specifying the information that such account should contain.

On January 15, 1915, the defendant filed an account prepared and certified to as correct by William A. Zolg, Auditor of the Toledo Company, hereinafter called defendant's account. Plaintiff objected to the account and moved for an order on defendant to make a further account in compliance with the Master's order. After some discussion it was agreed that Zolg should be produced before the Master for oral examination, and Zolg and other employees of defendant were afterwards produced and examined at Toledo where the books and records were, and the motion was not again called to the Master's attention.

Defendant's account covers only the period from March 8, 1911, to August 31, 1912, March 8, 1911, being the day on which the defendant began to manufacture scales with aluminum spiders. The spider in a cylinder scale is the framework inside of the cylinder. Zolg did not include in defendant's account business done prior to March 8, 1911, because he was directed by counsel for the defendant not to do so. Counsel for the defendant took the position that the defendant was not bound to account for scales not containing the aluminum spider although Zolg in defendant's account for the period covered therein included scales with steel spiders as well as scales with aluminum spiders.

The defendant's account, covering as it does but a fraction of the accounting period, does not furnish a basis for stating the account for the entire period, but the account furnishes

useful information that has been used by other accountants who followed Zolg.

Marwick, Mitchell, Peat & Company, chartered accountants, of the City of Chicago, on plaintiff's behalf examined the books of account and records of the Toledo Company at Toledo and submitted, a report, introduced in evidence as Plaintiff's Exhibit 40. The report is elaborate and purports to show the profits made on cylinder scales during the accounting period. Mr. Hall, a member of the firm of Marwick-Mitchell, who directed the work, and others who examined the books and obtained the figures used in the report, testified as witnesses in the case.

After the plaintiff had closed its case in chief, Price, Waterhouse & Company, public accountants of the City of Chicago, on behalf of the defendant examined the books and records of the Toledo Company at Toledo and the report made by Marwick-Mitchell, together with the working papers used by Marwick, Mitchell in making their report. Price-Waterhouse prepared reports, introduced in evidence as Defendant's Exhibits 21, 22, 23, 26 and 27, and later along Defendant's Exhibit 61 was introduced. Price-Waterhouse did not prepare a report from the books showing the necessary information to construct a complete account of the business. They took the report of Marwick-Mitchell, Plaintiff's Exhibit 40, as a basis and made such additions to and deductions from the figures in that exhibit as they claimed the books and records of the defendant required. Defendant's accountants in Exhibits 21, 22, 23, 26 and 27 deal with the accounts for the year 1911 only, and, having obtained the figures for that year, use those figures as a basis of apportionment to arrive at the results of the business for the years 1906, 1907, 1908, 1909, 1910, 1911 and eight months of 1912, as shown by Defendant's Exhibit 61, covering the entire accounting period.

Price-Waterhouse attempted to reform the books of the Toledo Company as to the year 1911 and the calculations made by them and the results given are not based on the figures as they were entered on the books of the Toledo Company, but from figures that in their opinion should have been entered, that is, in many cases they disregarded the theory upon which the books were kept by the Toledo Company and substituted theories which they regarded as better. Defendant's Exhibits 21, 22, 23, 26 and 27 are based on such reformed accounts. Defendant's Exhibit 61 is made for the purpose of applying the results of the year 1911 as disclosed

in Defendant's Exhibits 21, 22, 23, 26 and 27 to the business done in the other years of the accounting period. However, the figures shown in these exhibits were practically all abandoned on the hearing before the Master and the figures disclosed in Plaintiff's Exhibit 40, as changed and corrected on the hearing, were in the main acquiesced in by the Toledo Company and have formed the basis of the account as herein stated.

After defendant's exhibits were introduced Marwick-Mitchell prepared four additional reports, introduced in evidence as Plaintiff's Exhibits 77, 78, 79 and 80. Exhibits 77, 78 and 79 are statements comparing the figures obtained by Marwick-Mitchell for the plaintiff and Price-Waterhouse for defendant. Exhibit 80 is a statement of experimental, litigation and patent expenses that plaintiff claims should not be credited to the Toledo Company in this account.

The Toledo Company sold scales all over the United States, in Canada and other foreign countries. The scales sold in foreign countries other than Canada were manufactured at Toledo and sold from Toledo and shipments were made from Toledo to the purchasers. The defendant does not dispute the right of the plaintiff to the profits made on these scales and they have been treated in this report in all respects the same as domestic sales.

Gross and net sales of cylinders and fans and per cent each bears to total sales.

The gross sales of new cylinder and fan scales during the accounting period, exclusive of Canadian sales, are shown in the table that here follows, marked "A":

"Table A"

	Cylinder Scales	Fan Scales
1906	$ 5,760.00	520,925.00
1907	154,758.00	456,924.30
1908	459,372.50	444,345.81
1909	605,466.41	615,479.33
1910	789,358.11	523,625.78
1911	803,608.01	513,869.71
1912 (8 mo.)	516,216.61	313,144.09

From these gross sales there must be deducted what are termed chargebacks. When a scale was sold that did not stay sold or for some reason was never delivered or was repossessed after delivery by the Toledo Company, a credit was

made in the proper amount on the books, charging back the purchase price or the unpaid portion thereof. The following table "B" shows the net sales of new cylinder and fan scales, exclusive of Canadian sales, after deducting charge-backs. There is no dispute as to the figures used in Tables A and B.

"TABLE B"

	Cylinder Scales		Fan Scales	
1906	55 scales at	$ 5,444.00	5360 scales at	$482,065.76
1907	1159 " "	147,836.00	4679 " "	420,842.84
1908	3052 " "	437,076.75	4581 " "	409,001.14
1909	3929 " "	556,108.08	7733 " "	583,572.67
1910	5060 " "	722,625.76	6615 " "	492,704.53
1911	4675 " "	725,622.14	7652 " "	475,770.27
1912 (8 mo.)	2894 " "	469,031.71	4768 " "	329,244.01

To arrive at conclusions as to credits and deductions hereafter to be made it is necessary to ascertain the per cent that the gross sales and also the net sales of new cylinder and fan scales bear to total sales. The following table "C" shows the gross per cents and the following table "D" shows the net per cents:

"TABLE C"

	Cylinder Scales	Fan Scales
1906	1.09% of total gross	98.91% of total gross
1907	25.30% " " "	74.70% " " "
1908	50.83% " " "	49.17% " " "
1909	49.58% " " "	50.42% " " "
1910	60.11% " " "	39.89% " " "
1911	60.99% " " "	39.01% " " "
1912 (8 mo.)	59.36% " " "	40.64% " " "

"TABLE D"

	Cylinder Scales	Fan Scales
1906	1.14% of total net	98.86% of total net
1907	26.00% " " "	74.00% " " "
1908	51.66% " " "	48.34% " " "
1909	48.80% " " "	51.20% " " "
1910	59.46% " " "	40.54% " " "
1911	60.40% " " "	39.60% " " "
1912 (8 mo.)	58.76% " " "	41.24% " " "

To obtain the gross business, excluding Canadian, the second-hand scale sales must be added. The following table "E" shows the gross cylinder sales, gross fan sales, gross second-hand sale and the total gross sale:

"TABLE E"

	Cylinders	Fans	Second-hands	Total
1906	$ 5,760.00	$520,925.00		$ 526,685.00
1907	154,758.00	456,924.30	$ 850.00	612,532.30
1908	459,372.50	444,345.81	21,647.10	925,365.41
1909	605,466.41	615,479.33	48,345.70	1,269,291.44
1910	789,358.11	523,625.78	92,107.79	1,405,091.68
1911	803,608.01	513,869.71	94,820.35	1,412,298.07
1912 (8 mo.)	516,216.61	353,144.09	95,170.80	964,531.50

Hereafter in the report the different cost figures will contain expenses of second-hand scales and therefore cylinder scales should receive credit for a part of the second-hand sales. The following table "F" shows the net sales of second-hand scales and the part thereof to be added to cylinder sales, apportioned on the percentage that net sales of new cylinder scales bear to total net sales of new scales:

"Table F"

1906	no second-hand sales.					
1907	26.00%	of	$ 850.00	second-hand sales	$	221.00
1908	51.66%	of	21,647.10	" " "		11,182.89
1909	48.80%	of	48,345.70	" " "		23,592.70
1910	59.46%	of	92,107.79	" " "		54,767.29
1911	60.40%	of	94,820.35	" " "		57,271.49
1912 (8 mo.)	58.76%	of	85,872.30	" " "		50,458.56

Manufacturing and selling expenses and other deductions. Manufacturing Cost.

The defendant kept no cost sheets or cost records during the accounting period and to arrive at costs reliance must be placed on the cost figures given in the defendant's account filed herein pursuant to an order of the Master directing the defendant to file an account in compliance with Federal Equity Rule 63.

The account was prepared by Mr. Zolg, Auditor of the Toledo Company, and covers the last ten months of 1911 and the first eight months of 1912. The information upon which Mr. Zolg bases his cost figures was obtained by him during the many years he was in charge of the accounting department and from reports and information procured by him as to labor and material costs from the factory auditing department and from books, records and sources available to him. His connection with the Toledo Company renders it practically certain that the cost figures furnished by him are not unfair to that company and such cost figures have been accepted and relied upon by the plaintiff and have been

adopted in this report as the safest method of obtaining the manufacturing cost. The method used by Zolg in making the account as to overhead expenses has been approved and used by the accountants on both sides of the case. While the defendant's account covers only the period above mentioned, the cost of labor and material did not vary materially during the accounting period and it is therefore safe to apply Zolg's costs for 1911 and 1912 to the remainder of the period.

To obtain the cost of direct labor and material the net number of scales sold in each year has been multiplied by the cost figures given in defendant's account for the different styles of scales sold during the year. In cases where no cost was given for a particular style number of scale the cost figure used was the figure that the evidence showed applied to the scale nearest to it in cost for which a cost figure was furnished and which was substantially the same, Plaintiff's Exhibit 40. The net sales rather than the gross sales are used because repossessed scales were sold over again as new scales and took a manufacturing cost when resold, and if the gross sales are taken, repossessed scales would receive a double manufacturing cost.

Having obtained in this way the cost of direct labor and material of cylinder scales, it is necessary to find the factory overhead of cylinder scales. The factory overhead that went into manufacturing cost is found in the following accounts on the defendant's books: Indirect Labor, Factory Supplies, Experimental, Tools and Patterns, Packing and Shipping, Lumber, Trucking, Maintenance, Repairs and Alterations, Power, Heating and Light, Superintendent and Factory Office, Miscellaneous Factory Expense and Refinishing Expense. The total direct labor and material for fans and cylinders and the total factory overhead for fans and cylinders are given on the books of the Toledo Company and are not disputed.

Following the method used in defendant's account and by the accountants on both sides of the case, the total direct labor and material for fans and cylinders should be divided into total factory overhead for fans and cylinders and it will be found that the total factory overhead for each year is a certain per cent of total direct labor and material for each year, and on the theory that factory overhead for cylinder scales will bear the same ratio to direct labor and material for cylinders that total factory overhead for fans and cylinders bears to total direct labor and material for fans and cylin-

ders, the per cent figure so obtained should be used to find the factory overhead apportionable to cylinder scales.

The following table "G" shows the direct labor and material and factory overhead applicable to cylinder scales ascertained as above stated:

"Table G"

	Direct Labor and Material.	Factory Overhead.	Total Manufacturing Cost.
1906	$ 817.30	$ 403.91	$ 1,221.21
1907	17,203.93	7,425.22	24,629.15
1908	45,187.17	18,612.60	63,799.77
1909	58,260.64	21,032.09	79,292.73
1910	76,457.55	48,130.03	124,587.58
1911	74,151.95	59,447.52	133,599.57
1912 (8 mo.)	46,157.98	33,556.85	79,714.83

In the manufacturing costs given above in each year there has been apportioned to and included in cylinder cost of manufacture a portion of the expenses shown in an account carried on the books of the Toledo Company called the Experimental Account. This is an account of the expenses of the Toledo Company's invention department. The evidence does not show the nature and character of the items of this account, nor does it show that any of the expenses in this account were incurred on account of cylinder scales or had anything to do with cylinder scales. One DeVilbiss, an inventor, was employed by the Toledo Company and was for several years at the head of this department. What DeVilbiss did and what others under him or connected with that department may have done or what the moneys charged as expenses were paid out for is not shown by the evidence. In fact it appears that nobody connected with the Toledo Company knows what the charges in this account represent.

Because of the absence of evidence as to the transactions and expenditures upon which the items of expense found in this account are based, the amounts yearly that have been already included in the manufacture cost of cylinder scales should be deducted.

The following table "H" shows the amount that has been included each year in manufacturing cost on account of the charges in this Experimental Account and it shows also the amount of manufacturing cost after deducting these accounts:

"Table H"

1906	$ 82.96	charged	which	deducted	leaves	cost	$ 1,138.25
1907	994.38	"	"	"	"	"	23,634.77
1908	2,896.49	"	"	"	"	"	60,903.28
1909	3,355.81	"	"	"	"	"	75,936.92
1910	4,801.54	"	"	"	"	"	119,786.04
1911	5,368.60	"	"	"	"	"	128,230.97
1912 (8 mo.)	4,061.90	"	"	"	"	"	75,652.93

Commissions

The salesmen of the Toledo Company were compensated for their services with commissions on sales. The amounts paid out on account of commissions for the various years of the accounting period are shown on the books of the company and are not in dispute.

There is a controversy between the parties as to the manner of arriving at the amount of commissions chargeable against cylinder scales. The plaintiff suggests that for the years 1906, 1907, 1908, 1909 and 1910 the commissions should be found by apportioning the total commissions shown on the books between cylinder and fan scales and that for the years 1911 and 1912, as defendant's account filed herein covering the last ten months of 1911 and the first eight months of 1912 shows the commissions paid to agents on cylinder scale sales and the number of cylinder scales sold during that time, the average commission on a scale should be found for the years 1911 and 1912 respectively and the average commissions so found should be applied to the number of cylinder scales sold in 1911 and 1912 respectively to ascertain the commissions for those two years.

Mr. Zolg who made the defendant's account reported the net commissions received by agents after the company had deducted therefrom excess allowances made by such agents to purchasers and did not report the amount of commission the agent was entitled to on such sales or that the company in fact paid. An agent sometimes made a greater allowance to a purchaser than he was authorized to make. In such cases the excess allowance was charged against his commissions in the commission account and he was paid the difference between the commission earned on the sale and the amount of the excess allowance.

The defendant suggests that its accountants allocated the commissions for 1911 to cylinder scales and that such allocation should stand for the year 1911 and be used as a basis of arriving at commissions for the other years of the account-

ing period. The so-called allocation of 1911 was reached by reforming the commission account as shown on the books to conform to the theory of defendant's accountants and it was found impossible to allocate commissions to specific sales or to keep the business of 1911 separate and apart from the business of a portion of 1910 and a portion of 1912. The method used to ascertain commissions for the other years of the accounting period on the basis of 1911 might produce grossly inaccurate results, and the method used, the results of which are shown in the following table, is better suited to produce reasonably accurate results.

The plaintiff's suggestion as to the years 1906, 1907, 1908, 1909 and 1910 has been adopted and as to the years 1911 and 1912 has been rejected. The defendant's suggestion has been rejected.

The commissions attributable to cylinder scales have been determined by finding the per cent that total commissions bear to total net sales for each year and taking that per cent of cylinder net sales for each year. The net sales rather than gross sales have been used as the basis of calculation because commissions were allowed only on net sales. The following table shows the result:

"Table I"

	Per cent of commissions to total net sales.		Cylinder net sales.		Commissions chargeable to cylinder sales.
1906	31.73%	of	$ 5,544.00	gives	$ 1,759.11
1907	34.20%	"	148,057.00	"	50,635.49
1908	38.39%	"	448,259.64	"	172,086.82
1909	35.36%	"	579,700.78	"	204,982.20
1910	31.38%	"	777,393.05	"	243,945.94
1911	27.57%	"	782,893.93	"	215,843.86
1912 (8 mo.)	28.41%	"	519,490.27	"	147,587.19

Commercial and Selling Overhead.

The total commercial and selling overhead of the Toledo Company for the entire accounting period is not in dispute. It is made up of the following accounts: District Managers' Salaries and Expenses, Branch Office Expense, Miscellaneous Selling Expense, Cash and Quantity Discounts, Collection and Exchange Expense, Fidelity Bonds Expense, Freight on Scales, Insurance, Dining-Room Expense, Legal Expense,

Litigation Expense, Patent Expense, Office Payroll, Office Supplies, Postage, Recording Orders, Rents, Taxes, Telephone and Telegraph, General Expense.

There is a dispute as to whether in apportioning these expenses between cylinder and fan sales the apportionment should be made on the basis of net sales or on the basis of gross sales. Inasmuch as commercial and selling overhead is necessary in making sales, whether those sales stand or whether they are rescinded, the division should be made on the basis of gross sales.

The following table "J" shows the total commercial and selling overhead for the respective years and the portion thereof chargeable to cylinder sales. (For the per cent figures used herein see Table C.)

"Table J"

		Total Commercial and selling.		Applicable to cylinder scales.
1906	1.09% of	$142,971.51	gives	$ 1,558.39
1907	25.30% "	145,800.00	"	36,887.40
1908	50.83% "	188,249.67	"	95,687.30
1909	49.58% "	279,869.26	"	138,759.18
1910	60.11% "	367,934.92	"	221,165.65
1911	60.99% "	406,626.99	"	248,001.70
1912 (8 mo.)	59.36% "	274,573.75	"	163,046.98

In the above commercial and selling overhead apportioned to cylinder scale sales are included the following amounts of litigation and patent expenses that should be deducted:

"Table K"

1906	1.09% of	$ 7,965.55,	$ 83.88	deducted	leaves	$ 1,474.51
1907	25.30% "	14,173.88,	3,585.99	"	"	33,301.41
1908	50.83% "	9,079.21,	4,614.06	"	"	91,073.24
1909	49.58% "	9,588.57,	4,754.01	"	"	134,005.17
1910	60.11% "	13,012.65,	7,821.90	"	"	213,343.75
1911	60.99% "	17,159.52,	10,465.59	"	"	237,536.11
1912 (8 mo.)	59.36% "	22,525.68,	13,371.24	"	"	149,675.74

The expenses of the Legal Expense Account such, for example, as the expense of collecting accounts have been included in commercial and selling expenses. Litigation and Patent Expense are of a different character. The plaintiff introduced evidence as to these expenses in the years 1911 and 1912, showing that the items were for expenses of this litigation,

expenses of obtaining patents in this and foreign countries and other like charges. No evidence was introduced by either side explaining the items in these accounts for the other years of the accounting period, and it must therefore be assumed that they are of the same general character and not allowable as deductions in favor of the defendant. For vouchers and copies of these accounts for 1911 and 1912 see Vol. I of the transcript, pp. 378-382, 391-395, 400-410, 328-334, 215-274.

Losses on Agents' and Customers' Accounts.

The amount to be allowed the defendant on account of losses on agents' and customers' accounts was adjusted by agreement between counsel before the Master. By this agreement there is to be allowed to the defendant 3% on net sales of cylinder scales for each year of the accounting period except for the eight months of 1912. As to that period it was agreed that the amount shown in the defendant's account which was for new scales only should be taken and to this figure should be added 3% of second-hand cylinder sales, making the amount shown in the table. In addition to the above it was agreed that $5,166.46 should be distributed over the years in proportion to the losses in those years as shown by the following table:

"Table L"

1906	3% on cyl. sales,	$ 166.32 plus	$ 5.27 =	$ 171.59
1907	3% " " "	4,441.71 plus	233.99 =	4,675.70
1908	3% " " "	13,447.79 plus	708.28 =	14,156.07
1909	3% " " "	17,391.02 plus	916.45 =	18,307.47
1910	3% " " "	23,321.79 plus	1,228.96 =	24,550.75
1911	3% " " "	23,486.82 plus	1,147.17 =	24,633.99
1912 (8 mo.)	(See above)	19,066.42 plus	926.34 =	19,992.76
		101,321.87 plus	5,166.46 =	106,488.33

Allowances.

The total allowances for second-hand scales taken in part payment for new scales for the different years of the accounting period are shown on the books of the Toledo Company, and the amounts shown are conceded to be correct. The books do not show how much of the allowances for any years was made on cylinder sales or how much was made on fan sales and some plan must be adopted to determine how much of the allowances is properly chargeable against cylinder scales.

The defendant claims that its accountants examined the books of the Toledo Company and allocated to cylinder sales

the allowances actually made on cylinder scale sales for the year 1911, and contends that the amount so allocated should be the amount charged against cylinder sales for 1911 and that the amount to be charged against cylinder sales for the other years of the accounting period should be found by taking the per cent of cylinder gross sales for each of the other years of the accounting period that cylinder allowances as shown by such allocation bear to cylinder gross sales for the year 1911.

It is not claimed that the accountants made an exact allocation of allowances to cylinder scales for the year 1911. It is conceded that the attempted allocation included a portion of the business of 1910 and a portion of the business of 1912, and the manner in which the books were kept, without any effort to distinguish between fans and cylinders, and the great number of transactions that had to be analyzed in the time the accountants gave to this work render it uncertain whether the claimed allocation would produce reasonably accurate results.

The method adopted as most suitable to produce reasonably accurate results for all of the years of the accounting period is to take that per cent of total allowances that cylinder net sales bear to total net sales. Net sales rather than gross sales are used because, when a sale was rescinded and the scale repossessed all allowances made on such rescinded sale were deducted from the allowance account.

The following table "M" shows the total allowances, the per cent of cylinder net sales to total net sales as given in Table D, and the allowances chargeable to cylinder sales:

"Table M"

	Total Allowances	Applicable to Cylinders		
1906	$ 18,554.45	1.14%	thereof	$ 211.52
1907	24,737.50	26.00%	"	6,431.75
1908	82,905.26	51.66%	"	42,828.86
1909	82,779.23	48.80%	"	40,396.26
1910	101,359.87	59.46%	"	60,268.58
1911	150,194.94	60.40%	"	90,717.74
1912	91,578.56	58.76%	"	53,811.56

Interest on Investment.

That the defendant is entitled in this accounting to credit for interest on its investment in the business is not disputed. The plaintiff and defendant, however, disagree radically as

to the proper basis for arriving at the amount for which defendant should have credit. The method suggested by the defendant has been adopted in this report: it is to take from the yearly statements, Plaintiff's Exhibits 8 to 15, the valuations of the tangible assets, excluding therefrom patents and good will, and on the investment thus ascertained for each year calculate interest at the rate of 5% per annum and apportion that interest so calculated to cylinder sales in the respective years on the ratio that cylinder gross sales bear to total gross sales as shown by Table C.

The following table "N" shows the total investment for each year, interest thereon at the rate of 5% per annum, and the amount of such interest apportionable to cylinder sales:

"Table N"

	Investment	Interest at 5%		Apportionable to cylinder sales
1906	$ 362,040	$18,102	of which 1.09% =	$ 197.31
1907	423,220	21,161	" " 25.30% =	5,353.73
1908	551,820	27,591	" " 50.83% =	14,024.50
1909	634,600	31,730	" " 49.58% =	15,731.73
1910	950,000	47,500	" " 60.11% =	28,552.25
1911	1,000,000	50,000	" " 60.99% =	30,495.00
1912 (8 mo.)	1,000,000	33,333	" " 59.36% =	19,786.66

Canadian Business.

In addition to the business of the Toledo Company already considered, that company carried on a Canadian business from sometime in 1908 to the end of the accounting period. The scales were all assembled in Canada and all sold in Canada though some of the parts were made at the Toledo plant and some of the parts were procured in Canada. The evidence does not make it clear whether at any time during the period all of the parts were made at the Toledo plant, nor does the evidence make it clear that at any time during the period all of the parts were made in Canada.

The first sales of cylinder scales in Canada were made in 1908, presumably through the agency of Joseph P. Cleal, as it appears from the evidence that in 1909, a year later, Cleal maintained a branch office in Toronto where parts were assembled into completed scales. Sometime in 1910 an assembling plant was established at Windsor, Canada, and thereafter all scales sold in Canada were assembled at this plant. From the time Canadian sales began in 1908 to the time the Windsor plant was established in 1910 parts of scales were manufactured at the Toledo plant and shipped to Canada where

they were assembled. Whether during this time all of the parts necessary to make a completed scale were sent from the Toledo plant or whether some of the parts were procured in Canada is not made clear by the evidence. After the assembling plant was established at Windsor in 1910 certain parts of the scales such as pinions, spiders, hubs, screws, etc., were shipped from Toledo to Windsor and other parts such as castings were procured and shipped direct from Hamilton, Ontario, to Windsor and there assembled.

The accounts relating to Canadian sales were carried on the books of the Toledo Company. Up to November 11, 1908, the Canadian sales were carried in the U. S. Sales Account, but on that day a Canadian Sales Account was opened. Beginning with the opening of the Windsor factory in 1910 the Canadian sales were kept in a separate section of the general journal of the company and a separate Canadian ledger was opened. Up until the beginning of 1912 there was no separate account kept of the items of expense of the Canadian business, but from the beginning of 1912 until the end of the accounting period the item of discount, collection, freight and legal expense were separated. Canadian items enter into other accounts such as postage, recording orders, losses on customers' accounts, miscellaneous expense, supplies account, lumber, packing and shipping, etc.

The following table shows the total Canadian sales, both fans and cylinder, and separately the total cylinder sales:

"Table O"

1908	Total Sales,	$ 15,262.50,	Cylinder Sales			$10,610.00
1909	" "	77,667.41,	" "			48,924.50
1910	" "	107,911.92,	" "			73,358.35
1911	" "	149,644.23,	" "			97,798.51
1912 (8 mo.)	" "	108,960.00,	" "			67,190.45

The books and records of the Toledo Company show the total Canadian profits. The following table shows such total profits for both fans and cylinders, the per cent of cylinder sales to total Canadian sales, and the profits on cylinder sales:

"Table P"

	Total profit	Per cent of cyl. to total Canadian sales	Cylinder profit
1908	$ 6,317.67	69.52%	$ 4,392.04
1909	15,754.42	63.00%	9,925.28
1910	20,097.70	67.98%	13,662.41
1911	26,062.32	65.35%	17,031.73
1912 (8 mo.)	18,047.31	61.67%	11,129.78
Total cylinder profit, Canadian			$56,141.24

The figures given in the above tables "O" and "P" are not in dispute. They are shown in Plaintiff's Exhibits 8, 9, 10, 11 and 12 and are the figures adopted by both sides.

The plaintiff claims that it is entitled to be credited with the profits shown above in this accounting, but as Canadian scales were assembled and sold in Canada and not in the United States and some parts of the scales were during a part or all of the time procured in Canada, profits on such sales have not been included.

Since profits have not been allowed on Canadian business, the defendant should be charged with all expenses on account of Canadian business that have entered into cost figures heretofore considered in relation to the United States business, and this the defendant concedes. As the manufacturing cost of United States sales was obtained by using a per scale cost for direct labor and material and taking the per cent of the figure thus obtained that total factory overhead bore to total net sales to find the factory overhead, it follows that the manufacturing cost of United States scales does not include anything on account of Canadian scales and nothing should be charged on account thereof. There should, however, be charged against the defendant on account of Canadian business a proportionate part of commercial and selling overhead expense of the Toledo Company after deducting therefrom items of expense that are applicable only to sales made in the United States such as district managers' salaries and expenses, special salesmen's salaries and expenses, branch office expenses, etc. In addition to these deductions there should also be deducted litigation expense since litigation expense has not in this report been included in the expenses of the United States business. (See table K where same was deducted.)

The following statement shows the amount of expenses each year in which Canadian business was done that should be charged against the defendant in this accounting, or, what is equivalent, added to the plaintiff's profits, as having already entered into commercial and selling overhead expense of United States scales:

Year 1908

Cylinder sales (net)	$437,076.75	
Fan " "	409,001.14	
Canadian " "	15,262.50	
Total	$861,340.39	
Of this total amount Canadian sales are 1.77%.		
Total commercial and selling overhead is		$188,249.67
from which there should be deducted:		
Branch Office Expenses	$43,911.03	
District Agents' "	8,089.85	
Litigation Expense	9,079.21	61,080.09
		$127,169.58

of which 1.77%, represented by the Canadian business, is $2,250.59. In 1908 there was charged to cylinder sales 5.83% of the total commercial and selling overhead; 50.83% of Canadian commercial and selling overhead, $2,250.90, is $1,144.13 which should be added to cylinder profits.

Year 1909.

Cylinder Sales (net)	$556,108.08	
Fan " "	583,572.67	
Canadian " "	77,767.41	
Total	$1,217,448.16	
Of this total amount Canadian sales are 6.22%.		
Total commercial and selling overhead is		$279,869.26
from which there should be deducted:		
District Managers' Salaries	$ 5,680.00	
" " Expenses	8,302.74	
Special Salesmen's Salaries	2,755.00	
" " Expenses	1,610.27	
Branch Office Expenses	57,902.22	
Litigation Expenses	9,588.57	85,838.80
		$194,030.46

of which 6.22% is $12,068.69, Canadian commercial and selling overhead. In 1909 there was charged to cylinder sales 49.58% of the total commercial and selling overhead; 49.58% of Cana-

dian commercial and selling overhead, $12,068.69, is $5,983.65, which should be added to cylinder profits.

Year 1910

Cylinder Sales (net)	$722,625.76	
Fan " "	492,704.53	
Canadian " "	107,911.92	
Total	$1,323,242.21	

Of this total amount Canadian sales are 8.15%.

Total commercial and selling overhead is $367,934.92

from which there should be deducted:

District Managers' Salaries	$39,323.37	
" " Expenses	12,287.88	
Special Salesmen's Salaries	7,552.16	
" " Expenses	3,426.89	
Branch Office Expenses	83,157.90	
District Managers' Convention	145.25	
Litigation Expense	13,012.65	158,906.10
		$209,028.82

of which 8.15% is $17,035.85, Canadian commercial and selling overhead. In 1910 there was charged to cylinder scales 60.11% of the total commercial and selling overhead; 60.11% of Canadian commercial and selling overhead, $17,035.85, is $10,240.24 which should be added to cylinder profits.

Year 1911

Cylinder sales (net)	$725,671.39	
Fan " "	475,770.27	
Canadian " "	149,644.23	
Total	$1,351,085.89	

Of this total amount Canadian sales are 11.70%.

Total commercial and selling overhead is		$406,626.99
from which there should be deducted:		
District Managers' Salaries	$ 42,400.37	
" " Expenses	11,577.91	
" " Convention	252.25	
Special Salesmen's Salaries and Expenses	66.29	
Branch Office Expenses	115,173.59	
Freight Outbound	12,991.19	
Freight Inbound	2,844.67	
Litigation Expense	17,159.52	202,465.79
		$204,161.20

of which 11.70% is $23,886.86, Canadian commercial and selling overhead. In 1911 there was charged to cylinder sales 60.99% of the total commercial and selling overhead; 60.99% of Canadian commercial and selling overhead, $23,886.86, is $14,568.59 which should be added to cylinder profits.

Year 1912 (8 mo.)

Cylinder sales (net)	$469,031.71	
Fan " "	329,244.01	
Canadian " "	108,960.00	
Total	$907,235.72	

Of this total amount Canadian sales are 12.01%.

Total commercial and selling overhead is	$274,573.75
from which should be deducted:	

District Managers Salaries	$24,247.70	
" " Expenses	6,142.10	
Branch Office Expenses	66,654.29	
District Managers' Convention	1,381.95	
Freight Outbound	8,365.44	
Freight Inbound	2,800.82	
Cash Discounts	10,242.80	
Collection and Exchange	3,476.41	
Legal Expenses	7,840.30	
Quantity Discount	883.50	
Litigation Expense	22,525.68	154,560.99
		$120,012.76

of which 12.01% is $14,413.53, Canadian commercial and selling overhead. In 1912 there was charged to cylinder sales 59.36% of the total commercial and selling overhead; 59.36% of Canadian commercial and selling overhead, $14,413.53, is $8,555.87 which should be added to cylinder profits.

The following table "Q" shows the proportion of commercial and selling overhead expenses to be added to cylinder profit on account of Canadian business:

"Table Q"

1908	$ 1,144.13
1909	5,983.65
1910	10,240.24
1911	14,568.59
1912 (8 mo.)	8,555.87
Total	$40,492.48

Statement of Whole Account.

The following statement is based on figures in the tables already given, "A" to "Q" inclusive, and shows the profits on cylinder scales for each year of the accounting period:

1906

Cylinder Gross Sales		$ 5,760.00
Deduct Charge Backs		216.00
Cylinder Net Sales		$ 5,544.00
Deduct Manufacturing Cost	$ 1,138.25	
" Commissions	1,759.11	
" Commercial & Selling	1,474.51	
" Losses	171.59	
" Allowances	211.52	
" Interest	197.31	4,952.29
		$ 591.71

1907

Cylinder Gross Sales		$154,758.00
Deduct Charge Backs		6,922.00
Cylinder Net Sales		$147,836.00
Add second-hand sales proportion		221.00
		$148,057.00
Deduct Manufacturing Cost	$ 23,634.77	
" Commissions	50,635.49	
" Commercial & Selling	33,301.41	
" Losses	4,675.70	
" Allowances	6,431.75	
" Interest	5,353.73	$124,032.85
		$ 24,024.15

1908

Cylinder Gross Sales		$459,372.50
Deduct Charge Backs		22,295.75
Net Cylinder Sales		$437,076.75
Add second-hand sales proportion		11,182.89
Add Canadian Commercial Overhead proportion		1,144.13
		$449,403.77
Deduct Manufacturing Cost	$ 60,903.28	
" Commissions	172,086.82	
" Commercial & Selling	91,073.24	
" Losses	14,156.07	
" Allowances	42,828.26	
" Interest	14,024.50	$395,072.17
		$54,331.60

1909

Cylinder Gross Sales		$605,466.41
Deduct Charge Backs		49,358.33
Net Cylinders Sales		$556,108.08
Add second-hand sales proportion		23,592.70
Add Canadian Commercial Overhead proportion		5,983.65
		$585,684.43
Deduct Manufacturing Cost	$ 75,936.92	
" Commissions	204,982.20	
" Commercial & Selling	134,005.17	
" Losses	18,207.47	
" Allowances	40,396.26	
" Interest	15,731.73	$489,259.75
		$ 96,424.68

1910

Cylinder Gross Sales		$789,358.11
Deduct Charge Backs		66,732.35
Net Cylinder Sales		$722,625.76
Add second-hand sales proportion		54,767.29
Add Canadian Commercial Overhead proportion		10,240.24
		$787,633.29
Deduct Manufacturing Cost	$119,786.04	
" Commissions	243,295.94	
" Commercial & Selling	213,343.75	
" Losses	24,550.75	
" Allowances	60,268,58	
" Interest	28,552.25	$690,447.31
		$ 97,185.98

1911

Cylinder Gross Sales		$803,608.01
Deduct Charge Backs		77,985.87
Net Cylinder Sales		$725,622.14
Add second-hand sales proportion		57,271.49
Add Canadian Commercial Overhead proportion		14,568.59
		$797,462.22
Deduct Manufacturing Cost	$128,230.97	
" Commissions	215,843.86	
" Commercial & Selling	237,536.11	
" Losses	24,633.99	
" Allowances	90,717.74	
" Interest	30,495.00	$727,457.67
		$ 70,004.55

1912 (8 mo.)

Cylinder Gross Sales		$516,216.61
Deduct Charge Backs		47,184.90
Net Cylinder Sales		$469,031.71
Add second-hand sales proportion		50,458.56
Add Canadian Commercial Overhead proportion		8,555.87
		$528,046.14
Deduct Manufacturing Cost	$ 75,652.93	
" Commissions	147,587.19	
" Commercial & Selling	149,675.74	
" Losses	19,992.76	
" Allowances	53,811.56	
" Interest	19,786.66	$466,506.84
		$ 61,539.30

Profit for 1906	$ 591.71
" " 1907	24,024.15
" " 1908	54,331.60
" " 1909	96,424.68
" " 1910	97,185.98
" " 1911	70,004.55
" " 1912	61,539.30
Total profits	$404,101.97

Scales on Hand.

When the patent expired on the 3rd day of September, 1912, the Toledo Company had on hand manufactured and ready for sale 1839 cylinder scales. These scales were manufactured during the infringing period and ready for sale after the close of the infringing period.

It is claimed that while these scales had not been sold when the patent expired, there was a profit in them that the plaintiff is entitled to recover in this suit.

The profit made on 20,824 cylinder scales sold during the entire accounting period was $404,101.97 or $19.40 per scale. The profit made on the 2,894 cylinder scales sold during the eight months of 1912 immediately preceding the expiration of the patent was $61,539.30 or $21.26 per scale. The plaintiff claims that it is entitled to recover as profits for scales on hand at the close of the accounting period $19.40 per scale, being the average profit for the entire accounting period, amounting to $35,676.60.

Inasmuch as the profit in scales on hand was not in fact realized during the accounting period and can only be inferred, and the evidence does not show that profit was realized afterwards by the defendant, such profit has not been included in this accounting.

Good Will.

The plaintiff claims that it should be allowed as profits in this accounting the value of the business gained by the defendant through its infringement, basing its claim on the fact that at the end of the accounting period the defendant had acquired by its infringement a going business in indicator drum scales of about $800,000 a year upon which a large profit was made.

While there can be no doubt that the business in cylinder scales built up by the defendant during the infringing period was a gain, value or advantage to the defendant at and after the close of that period, I find no evidence upon which to base a finding of money value that should be allowed on account thereof. Any allowance would necessarily be based on speculation. I have therefore not included anything on account of good will in this accounting.

Divisions of Profits.

The plaintiff proved that substantial profits were realized by the defendant in making and selling the infringing scale. This the defendant does not deny, but it contends that not all of the profits made are due to the patent because there were embodied in its cylinder scale non-infringing elements and improvements, patented and unpatented, such as the counterforce system, base and lever system, dash-pot, shock absorber, leveling device, etc. that contributed to the profit fund.

The eight patents under which defendant claims its cylinder scales were built were introduced in evidence as follows: Reissue No. 12,138, Defendant's Exhibit 63; No. 667,652, Defendant's Exhibit 38; No. 830,976, Defendant's Exhibit 39; No. 839,736, Defendant's Exhibit 37; No. 1,068,616, Defendant's Exhibit 47; No. 1,122,222, Defendant's Exhibit 60; No. 1,142,165, Defendant's Exhibit 62; and No. 1,166,128, Defendant's Exhibit 59. These patents are combination patents and do not cover the elements separate from the combination.

The elements that defendant contends contributed to the profits were old and open to the public and none of them, if separated from the structure of which it is a part, would in itself be a usable or workable tool.

Two infringing scales were introduced in evidence, one marked Complainant's Exhibit Defendant's Scale and the other Defendant's Exhibit 55, disclosing the structural parts of the completed scale.

The defendant called three witnesses experienced in the scale are: Halvor O. Hem, Consulting Engineer for the Toledo Scale Company; Charles G. Neale, Commissioner of Weights and Measures for the State of Minnesota; and Dr. Fritz Reichmann, formerly State Superintendent of Weights and Measures for the State of New York, now at the head of the Service Department of the Fairbanks Company of New York. Hem and Neal explained the various parts of an automatic computing scale and pointed out those parts on the scale exhibits mentioned above. Neither testified as to the value, mechanically, commercially or otherwise, of the separate parts. Dr. Reichmann went more into detail, explained the parts of an automatic computing scale, giving the relative importance from a mechanical and also from an economic standpoint of the different parts in per cent figures as follows:

From a mechanical standpoint: (1) Counterforce system 50—; (2) Base and lever system 25%; (3) Connection be-

tween counterforce system and indicating mechanism 2%; (4) Dash-pot 5%; (5) Shock Absorber 2%; (6) Mounting for indicating device 5%; (7) Leveling device 5%; (8) Particular form of indicating device 2%; (9) Method of arranging figures on indicating device 2%; (10) Arrangement of openings to facilitate readings of such figures by dealer and customer 2%; making up a total of 100%.

From an economic standpoint: (1) Signs appearing on scale 5%; (2) Housing of scale 10%; (3) Lever system and combination of a platform and indicating scale, robust appearance and color, 20%; Leveling device 5%; Dash-pot and Shock Absorber 5%; Divisions on particular chart used, 2%; Openings with correct reference marks on customer's and dealer's side for reading figures, 2%; Particular form of indicating device, 2%; Counterforce system, 49%; making up a total of 100%.

Dr. Reichman explained the necessary parts of a complete automatic computing scale without regard to whether it was of the cylinder, cone, dial or disc variety. He dealt with physical parts of a scale and made no distinction between the different kinds of indicating devices or between different devices of the same general kind but of different construction such as light and heavy cylinders. He wholly disregarded the question as to whether any of the parts were covered by patents, combination or otherwise, and did not take the patent in suit into account at all in assigning a value, mechanical or economic, to the indicating device or cylinder to which the patent applies. This may account for his conclusion that the importance of that part of the scale covered by the patent is but two per cent of the whole. The calculations made by Dr. Reichmann as to the relative values of the different parts of a complete machine without considering the value of a patent on one of the essential parts is not helpful in an effort to determine whether all or only a portion of the profits on the scales of the completed scales is due to such patent.

The Toledo Company advertised the infringing scale extensively, principally by circulars distributed to the purchasing public. These circulars called attention pointedly to the features of the scale, that the company claims make it superior to all others, particularly that the defendant's scale contains no springs, but is of the pendulum variety. On this feature of its scale defendant predicates its slogan "No Springs—Honest Weight." The defendant did not in its advertising literature mention the light drum, the feature of

the Smith patent. What effect such advertising had on sales is not known. No evidence was offered on that question.

The evidence considered in this division of the report is the only evidence in the case bearing directly on the question of a division of profits. It is not sufficient, as I view it, especially when read in connection with the decision of the Circuit Court of Appeals relating to the character and scope of the patent and its far reaching effect in the computing scale art, to establish that any portion of the profits is due to causes other than the patent.

FINDINGS OF LAW.

I find the law of the case to be that the plaintiff is entitled to a decree against the defendant for $404,101.97, the profits made by the defendant company on the manufacture and sale of the infringing scale.

Most of the questions involved in this case are disposed of as questions of fact, or are covered by elementary principles of law.

There were 1839 cylinder scales, manufactured during the infringing period, on hand at the close of the period. Plaintiff contends that in these scales a profit inhered that was afterwards realized, and that the plaintiff is entitled to recover in this accounting as profits an amount per scale equal to the average profit per scale realized on the sale of the same kind of scales during the infringing period. No evidence was introduced as to market conditions prevailing after the close of the infringing period. Conditions may have been such that no profit at all was made on scales sold after the patent expired. Recoverable profits in accounting cases are profits actually realized, potential or prospective profits cannot be recovered.

In the account as stated cylinder scales have been made to bear overhead expenses on a proportion basis. The Toledo Company had an established plant and business and was selling fan scales at the time it began to make and sell the infringing scale, and the plaintiff contends there should only be charged against cylinder scales such expense as the evidence may show was added on account of the cylinder scale business. The rule laid down in the Tremolo patent case, 23 Wallace 518, seems just and equitable as applied to the facts in this case and has been adopted.

The plaintiff contends that, in view of the facts and circumstances and especially that the defendant has been al-

lowed five per cent interest on its capital invested, the plaintiff should be allowed in this accounting the value of the good will built up on cylinder scales during the infringing period. The good will of a business built up by an infringer is a gain or advantage, but not a profit, and its value cannot be recovered as profits. This suit has proceeded on the theory of recovering profits; besides there is no evidence as to the value of the good will and none upon which a finding in money value could be based.

The defendant urges that the evidence brings this case within division d, paragraph 1, of Westinghouse v. Wagner, 228 U. S. 604, 614; that as it appears from the evidence a part only of the profits was due to the patent, the burden of proof rested on the plaintiff to show that the entire marketable value of the scale is attributable to the patented feature, or to give evidence tending to segregate profits between the patented and unpatented features, or to show that by reason of intermingling the profits cannot be apportioned; that the plaintiff has not sustained this burden and is not entitled to recover more than a nominal sum. This contention is disposed of so far as the master is concerned by the finding of fact to the effect that the evidence when read in connection with the decision of the Circuit Court of Appeals is not sufficient to establish that any portion of the profits made is due to causes other than the patent.

It is a cardinal rule of patent law that where a patent produces but a part of the profits the plaintiff may recover only such part of the profits as the patent produces and the defendant may have credit for the remainder, and this rule holds good in cases where the patented part is so connected with other essential parts of the machine that if removed and nothing substituted in its place what remains will not be a complete or workable machine as well as in cases where the patented portion is separable and when separated leaves the remainder a complete workable machine. Westinghouse v. Wagner, 225 U. S. 604; Dowagiac 1. Minnesota, 235 U. S. 641; Herman v. Youngstown Co., 216 Fed. 607; Dunn v. Standard Co., 204 Fed. 617; Robbins v. Illinois Watch Co., 81 Fed. 958.

The cases cited above are cases in which a separation of the patented from the other parts would not leave a complete machine. It is too well settled to cite authorities that if the patent part of a machine be removed and what remains is a complete workable machine, segregation of profits should be made.

In reaching conclusions as to segregation the decision of the Circuit Court of Appeals in this case (208 Fed. 410) is controlling and what is said there is binding on the master. Crosby Valve Co. v. Safety Valve Co., 141 U. S. 441, 447.

It was urged by counsel for defendant that claims 5 and 6 of the Smith patent in suit were not combination claims and that Smith himself had designated his invention as an improvement, that cylinder scales had been made and used prior to Smith's patent and that what Smith did was simply to improve the cylinder by making it very light. It is a complete answer to this contention that it appears from the decision itself the Circuit Court of Appeals was not unmindful of what Smith said in his claims and other patent papers or of the fact that Smith was not the first to use cylinder drums in computing scales.

It is not contended that claims 5 and 6 are combination claims, that Smith obtained a patent on every element of every computing scale in which the patent invention might be used, but it is contended—and this contention is borne out by the decision—that Smith alone had the right to connect his patented part with any weighing mechanism and that Smith's patent covered the cylinder drum in connection with any weighing mechanism.

It does not follow that because a patent covers a mere improvement, profits must necessarily be segregated. Whether they shall or shall not depends upon the nature and character of the improvement itself, and it may be that an improvement will be of such a character as to produce a new result and be the cause of producing all of the profits. In this case Smith invented the first usable automatic computing scale, he brought about a new result and became entitled to all of the profits regardless of how he may have designated his invention in his patent papers. An inventor is entitled to the full benefit of what he actually invents whether he sees fit to call it an improvement or to call it something else. The courts have recognized that a mere improvement or attachment is one thing and that an improved machine that produces a new result is another thing.

This case comes within division a of paragraph 1 of the Westinghouse case.

BAKER, *Circuit Judge*, after making the foregoing statement of the case, delivered the opinion of the court:

From this and many other cases we get the impression that patent lawyers are quite generally possessed of the belief that a patent-infringement bill in equity, to stop future tres-

passes and to make the defendant pay for past trespasses, is *sui generis*. As this is counter to the conception of equity jurisprudence which we entertain and which lies at the root of many of the reasons given in the present decision, we proceed first to state briefly that conception.

Property may be classified as real or personal or mixed, and as tangible or intangible. But the right in property of all classes is one and consists ultimately of this and only this, the right to exclude others. When a new element in the material world was discovered, radium for instance, the possessing owner became entitled to the same rights and remedies that belonged to owners of previously known property. When the government created a new right in land in homesteaders, no statutory command was needed to open the door of equity to receive the homesteader's bill to stop future trespasses and to make the defendant pay for past trespasses. It would have taken a statutory prohibition to warrant the court in keeping him out. When the government, fulfilling the intent of the founders, granted to inventors a new right of property in their inventions, no statutory command was needed to open the door of equity to receive the patentee's bill to stop future trespasses and to make the defendant pay for past trespasses. It would have taken a statutory prohibition to keep him out; and a statute, stating that he may ask for an injunction and an accounting of profits and damages, should be construed simply as an affirmation of the pre-existing principles of equity.

So all bills for injunction are to vindicate the one fundamental concept of property, the right to exclude others. When the chancellor has found that the complainant has title, that he is possessed of the right to exclude the defendant, that the defendant has committed repeated trespasses, and that the defendant unless enjoined will continue (the defendant's state of mind can be proven only by the circumstances of his past trespasses unless he has admitted his intent), the decree of permanent injunction is the only adequate remedy, it exhausts all the equities of the bill, and it is final in its essence. It would also be final in time were it not that usually there is a legal appendage to the bill. Complainant's demand that he be made whole on account of past trespasses, if it stood alone, would have to be followed at law. But equity, having properly taken jurisdiction, draws to itself all other controversies arising from the same transactions, even if legal in their nature, and will not send the complainant to the law side to get his money judgment for past trespasses.

And in rendering the equitable decree on the merits the chancellor has heard all the evidence and found all the facts that are necessary for the money decree except the amount.

In making the defendant pay, an accounting of the defendant's profits is not peculiar to the patent-infringement suit. If the homesteader sues his neighbor to stop the cutting down and carrying away of trees, he is entitled, after obtaining his permanent injunction, to show that the defendant sold a tree for $100, that his expenses were $25, and that his net profit was therefore $75. As against the trespasser, who is a trustee *ex maleficio*, $75 is the true value of the appropriated property, although the owner might not have been able to get more than $50 from any one else. If $50 is the true valuation, and if the defendant has realized only $25 net profit, then the defendant must turn over his profit and also pay an additional $25. And if what is left of the domain has been damaged by the removal of the trees, the complainant, on proper proofs, is entitled to additional compensation. All these are means for measuring the total damage. The problem is always the same, to state in terms of money the results of the trespasses.

While the principles in the injunctional branch of equity are uniform, the practice in the patent-infringement suit has been disparate.

Under the old rules, the court in reaching the permanent injunction was helpless to control the proofs. Depositions were loaded with hearsay, with immeasurable masses of irrelevant matter, with controversies of counsel, with counsel's directions to witnesses not to answer, with experts' analyses of hundreds of prior patents when six would have been more than enough, with experts' interlarding of their opinions of facts with their opinions of the law of the case, etc., etc. We conjecture that in our clerk's vaults there are tons of paper which were pure waste. We leave it at conjecture because we have no computing scales on which to weigh the more important matters, the clients' exhaustion of patience and resources, the lawyers' mutual infliction of unnecessary labors, and the efforts of the courts to find the three grains of wheat in the bushel of chaff. But those evils are gone. Under the new rules, when the chancellor hears a patent suit as he does other injunction suits in open court, he can and does control the proofs, exclude hearsay and irrelevancies, restrain counsel, compel witnesses to answer proper questions, limit the number of prior patents, and bridle the experts. Records on appeals now show the gratifying difference.

But when it comes to rendering the money decree on a master's report, with attached evidence, counsel seem to be yet at large. Frequently they toy with the master pretty much as they did with the notaries before whom they took the depositions for use at the hearing of the merits of the bill. In the present case our finding on the merits of the patent and the fact of infringement was made in 1913, and the District Court's finding of complainant's title to the patent, the only question concerning the merits of the bill left open on remandment, was made in 1914; but the money decree was not entered till 1919, and the review here was not ready for presentation until the current year. Imagine a law court, with the single issue before it of damages for established or conceded trespasses, or the value of property wrongfully appropriated, or the value of property about to be lawfully appropriated (a condemnation case), permitting the parties to engage the attention of a jury for five years. We are not noting this case as being exceptionally Jarndyce; we are merely taking it as a text in speaking of a general situation.

In our judgment the Westinghouse case, 225 U. S. 604, should forever extinguish in the minds of infringers, caught and held by a decree on the merits, the hope, long entertained and theretofore frequently availed of with success, of escaping all but nominal damages by commingling the appropriated property with other property, by hiding, or by drawing herrings across the trail. Equity will pursue an infringer of a patent as vigilantly as it will any other trespasser. And the first fruits of the Westinghouse decision should be this: If a manufacturer, knowing of a patent, decides to chance an unlicensed use, he should realize that he may be caught by a final decree on the merits and be ordered to respond accordingly; and, so realizing, he should be held to the duty of keeping separate and accurate records of all his infringing acts; and, on his failure to keep such records, the court in measuring the damages on account of his trespasses should resolve all doubts against him.

New equity rule 63, we have no doubt, was intended to end the evils in reaching the money decree as completely as other new rules have ended the evils in reaching the merits decree. But if evils persist which can not be remedied by the rigid enforcement of rule 63, then, pending possible supplements to that rule, we believe that the chancellor, either in open court or through explicit directions to the master, in order to simplify and expedite the hearing has power to employ methods not inconsistent with promulgated rules. If a defendant, his

struggles over the merits being at an end, states his profits from the records contemplated in the preceding paragraph, the complainant (omitting for the moment any question of apportioning the profits between patented and unpatented parts) should be compelled to accept the statement as the measure of the money decree, unless he is prepared forthwith to allege and prove either (1) that the account was falsely stated or (2) that the profits, if truly stated, are not an adequate measure of the complainant's damages. If the first ground is sustained, the chancellor, either directly or through the master, might well appoint and qualify a competent and disinterested accountant to cure the defendant's default, and the report of the accountant should stand unless promptly impeached for fraud or gross inaccuracy. If the complainant should take the second ground, he might well be required to prove the value of the appropriated property as other such issues are tried, by the opinion testimony of experts qualified to speak of the value of the invention. And neither "established royalty" nor "reasonable royalty," as evidence of the value of the invention, would be necessarily the limit of value, for an infringer should not be allowed the profit which a licensee justly expects.

If a defendant satisfactorily states his profits from the infringing device, but contends that only a part thereof is attributable to the invention, he might well be required to allege in his account, taken as a verified pleading, the grounds on which he claims apportionment of profits, and his proofs should be limited to the averments.

Against this general background we proceed to view the assignments of error.

I. Defendant's contention that all the decrees should be reversed and the bill dismissed on account of complainant's alleged failure to prove title to the patent, is overruled.

A. Proof and finding of title constituted the base of the merits decree of 1914. No appeal was ever taken, unless the merits decree was carried along by the present appeal from the money decree. In our judgment the merits decree was final in its essence. *National Brake and Electric Company* v. *Christensen*, 258 Fed. 880; same case, 254 U. S. 425; same case (decided herewith), Fed. . But, assuming that defendant's position in correct, that the seven years old merits decree is now open to assault in this court because it was not the last step in the suit, we find:

B. In 1895 the franchise was granted. It expired in 1912. During defendant's infringement complainant was in open, notorious, adverse, exclusive and continuous possession of the franchise. Before 1912 and ever since complainant has been in like possession of the present cause of action. As the patent expired in 1912, no one now can interfere with defendant's manufacture of cylinder scales. As infringement ended in 1912, the statute of limitation protects defendant from being called on to pay damages to third parties. For its established trespasses we think defendant ought to pay some one; and no one is at hand but complainant.

C. We remanded the case in 1913 for proof of title because the execution of assignments from the Smith Company to the Boston Company and from the Boston Company to complainant had not been proven, and defective acknowledgments prevented certified copies of the Patent Office records from being taken in lieu. Proofs of the execution of the Boston Company's assignment seem abundant and regular. As to the Smith Company's assignment the proofs show that all the stock was then owned by Bell and Luce, and they executed the assignment in the name and on behalf of the Smith Company. Whether there was a duly elected and acting board of directors, and proper officers, and due authorization by the directors for the officers to execute the instrument, are immaterial questions so far as defendant is concerned. An assignment in the name and on behalf of a corporation by all of its stockholders would convey at least a full equitable title.

II. Respecting the insistence that, on the proofs offered to the master and embodied in the record concerning Phinney's commercial practice as an anticipation, we should reverse our denial of defendant's 1913 petition to re-open the case on the merits, should reverse our precedent decree upholding the validity of the patent, and should reverse the District Court's decrees of 1914 and 1919 with the direction to dismiss the bill, we say:

A. If it be regarded as a demand to interpose a defense of invalidity as a matter of right because validity has not yet been adjudicated, our conception of the nature of the merits decree leads us to reject the demand.

B. If it be regarded as a petition in the nature of a bill of review, appealing to equitable discretion, then defendant's delay of eight years in presenting to us its bill of review to open our 1913 dismissal of its former bill of review on the same grounds, inclines us to stay our hands.

III. Defendant says that the master's report of $400,000 profits from cylinder scales is an inescapable and self-evident blunder because defendant's profits on its entire business during the infringing period from October, 1906, to September, 1912, were only one fourth of that amount.

A. There is no reliable basis in the record for finding that defendant's entire net profits were only one fourth of the master's award. In fact, as will more fully appear hereinafter, defendant never performed its duty, which arose at the end of its struggles on validity and infringement, of accepting the merits decree and making a full, frank and accurate report of its infringement doings. But,

B. Defendant's claim of error involves this fallacy: In a business comprising several branches, it is invariably true that each branch makes a profit; or, if it be deemed possible that a non-infringing branch should suffer a loss, then the profits from the infringing branch should first be applied to covering that loss.

IV. Under an order to file a full, frank and accurate account in compliance with equity rule 63, defendant, by its auditor Zolg, limited itself to the period from March 8, 1911, to August 31, 1912. This account was false in that it included only the cash part of sales in which secondhands were taken as part payment. But the master rejected the account principally because he would not accept the contention, now repeated here, that defendant was free to use cylinder scales in which the spiders of the cylinders were made of steel. March 8, 1911, was the date on which defendant claimed that it began to make aluminum spiders for cylinders.

A. Claim 5 covered a cylinder frame "of light material"; claim 6, "of aluminum." Both claims were alleged in the bill and found in the merits decree to be infringed. Aluminum frames infringed claim 6. Infringement of claim 5, unless we were in error in not finding that claim to be a mere duplicate of claim 6, could only arise from the use of material other than aluminum. Whether such material, as used, was sufficiently light to secure the benefits of the invention, was a question to be threshed out and settled at the final hearing on the merits.

B. If the question is open, we go back eight years to the original record and find that defendant's contention is a play upon the disparity of specific gravities. In view of Smith's disclosure in 1895, it was not difficult for defendant in 1906 to use steel so thin that the cylinders were of such "lightness"

as to fill perfectly the function of the cylinder in the complete weighing machine. In the hair-spring of a watch the specific gravity of steel is immaterial. At the hearing of the merits appeal the exhibit before us had a cylinder with a steel frame. If defendant is right in its present insistence, then auditor Zolg did wrong in including, after March 8, 1911, steel-frame cylinders as indiscriminable equivalents of aluminum-frame cylinders.

V. Defendant's principal assault upon the master's finding of profits on cylinder scales is directed to his acceptance of Zolg's figures on manufacturing cost. Defendant, after taking more than five months to prepare, filed Zolg's verified statement of manufacturing cost of cylinder scales from March, 1911, to September, 1912. And the master found that "the cost of labor and material did not vary materially during the accounting period, and it is therefore safe to apply Zolg's costs for 1911 and 1912 to the remainder of the period."

A. Defendant never complied with equity rule 63. For this inequitable attitude, defendant might well be held in default and, as other defaulters, to have forfeited the right to be heard until the default was set aside and a meritorius answer submitted. And the fact that the master and complainant took it upon themselves to state the account did not legally cancel the default.

B. Complainant accepted and acted on Zolg's figures of labor and material costs, and thereupon employed Marwick-Mitchell, chartered accountants, to examine defendant's books and records, and therefrom to report all the other elements necessary to a just accounting, such as manufacturing overhead, office overhead, selling expense, number of scales sold, gross and net sales, etc. After complainant's accountants had filed Exhibit 40, defendant employed Price-Waterhouse, chartered accountants. They did not examine the books and records for the accounting period, as they might have done. They confined their examination to 1911 and reported a theory by which auditor Zolg's figures on labor and material from March, 1911, to September, 1912, would be erroneous. They did not cover even the whole of Zolg's period. In preparing to discredit Zolg they "attempted to reform the books of the Toledo Company as to the year 1911, and the calculations made by them and the results given are not based on the figures as they were entered on the books of the Toledo Company, but from figures that in their opinion should have been entered." Having thus shown that Zolg's figures of labor

and material cost were wrong, they were ready to prove that Marwick-Mitchell were necessarily wrong. Defendant's default was not cured by such procedure. On the other hand, Marwick-Mitchell's account was a complete supplement to Zolg's account, and the two together covered the whole situation.

C. The master looked into the eyes and heard the voices of Zolg, Marwick-Mitchell and Price-Waterhouse. Intelligence and credibility of witnesses were involved.

D. Evidently from what occurred before him at the hearing the master found that the Price-Waterhouse calculations "were practically all abandoned on the hearing before the master, and the figures disclosed in Exhibit 40, as changed and corrected on the hearing, were in the main acquiesced in by the Toledo Company." Employment of new or additional counsel can not reinstate a matter that has been waived in open court.

VI. On the master's finding and on the state of the evidence, rejection of defendant's claimed allowances for expenses of litigation and of maintaining an experimental department and taking out patents, was right. The master was not compelled to substitute guesswork for defendant's failure of proof.

VII. Confirming, as we do, the District Court's confirmation of the master's report of profits on cylinder scales, there remains the alleged error in awarding all the profits to complainant.

Claims 5 and 6 covered Smith's invention of an indicating cylinder for use in association with (and in that sense, in combination with) any weighing mechanism so that the whole should constitute an automatic computing scale. It is immaterial that the claims are not combination claims, as "combination" is used in patent-law vernacular. If they were, the question would be the same: Of what did Smith's invention consist and what did it contribute to the weighing art? In dedicing the merits in 1913 we held that Smith's invention resulted in "the first usable automatic computing scale."

In the Westinghouse case it was held:

> "(a) Where the infringer has sold or used a patented article, the plaintiff is entitled to recover all the profits.
>
> * * * * * *
>
> "(d) But there are many cases in which the plaintiff's patent is only a part of the machine and creates only a part of the profits. * * * In such case * * * he

must show, by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature."

A. From our finding that Smith produced the first usable automatic computing scale, the master may be right in holding that this case comes within division (a) of the Westinghouse case, in spite of defendant's assertion of the absurdity of it, based on the illustration of allowing all the profit on a steam-engine to the inventor of the governor. If therefore the steam-engine had raced and racked itself to pieces so that commercially it was not a successful producer of power, then the inventor of the governor might be held to have created the first commercial successful steam-engine, though there were in existence at the time other commercial successful producers of power. And though prior to Smith's time there were many classes of commercially successful scales, Smith originated a new class, the first usable automatic computing scale.

B. But it is not necessary to let the case rest on division (a). From the master's elaborate account, showing equal cost of fan scales and cylinder scales, diminishing prices for fan scales, increasing prices for cylinder scales (indicating a stronger demand and readier sales), one can figure that the average difference in selling prices of the two types would account for all the profits on the cylinder scales, and thus demonstrate that the features common to the two types, such as electric lights to illuminate the readings of weight and price, created no part of the profits on the cylinder scales, but that all were due to the distinguishing element, the cylinder. So division (d) of the Westinghouse decision likewise supports this case.

C. Defendant seeks to use its hereinbefore mentioned evidence of Phinney's commercial practice as a standard of comparison for apportioning the profits on the cylinder scales between the cylinder and the other parts. In its own factory defendant furnished a most excellent standard of comparison, in fact the best we have ever found in accounting cases. Its fan automatic computing scale was a later production than complainant's. The two types were virtually duplicates except fan and cylinder. They were made by the same machinery, the same labor, from a common stock of materials, and handled by the same supervising and selling staffs. In

paragraph B of this section we have already made the comparison.

D. Defendant's failure to maintain any sore of cost accounting system, its commingling of the two businesses, its sales of fan scales and cylinder scales as integers without assigning any cost or any profit to any part of either, have made it impossible for us to reach any conclusion other than that adopted by the master as to the profits of defendant's business in cylinder scales and the award thereof to complainant.

In regard to complainant's assignments of error we find:

I. Interest on investment is really the value of the use of defendant's manufacturing plant and selling facilities in making and selling cylinder scales. This credit item was apportioned by the master according to the relative volumes of fan and cylinder business. We find no substantial basis for recasting the master's figures. That such an allowance is a just credit against gross profits, see *Western Glass Co.* v. *Schmertz Wire Glass Co.* 226 Fed. 730 (7th C. C. A.), and *Oehring* v. *Fox Typewriter Co.* 251 Fed. 587 (2nd C. C. A.).

II. Defendant made profits on sales of cylinder scales in Canada. But no completed cylinder scale nor completed cylinder was ever shipped to Canada. Some parts were manufactured in Canada, and some were made here and shipped there; but the parts were there assembled into completed scales and there delivered to Canadian users.

Because some of the parts were made in this country, complainant insists that defendant is to be held here as a contributory infringing maker. But contributory infringement can only arise in this country when somewhere and somehow in this country there is a completed infringement to which a contribution can be made. *Bullock Electric Co.* v. *Westinghouse Co.* 129 Fed. 105.

An additional urge is that defendant is liable as an infringing seller in this country because Canadian salesmen sent the orders of prospective Canadian users of the Canadian scales to defendant's office in Toledo for approval and such orders were not filled from the Canadian plant until so approved. Complainant is doubtlessly right in saying that the contract was executed (but not in the sense of performed) in this country. It seems to us that complainant is confusing a sale with an executory contract for a sale. If complainant's position is correct, then a Canadian manufacturer, who made his goods only in Canada and parted with them only to Canadian

users, would infringe a United States patent if he should meet here a prospective Canadian user and should enter into an executory contract to be performed in Canada.

III. Respecting the master's disposition of secondhand scales, we reject complainant's proposition that "when defendant sold an infringing scale at a fixed price in money it must account for that price in money." If the "fixed price" was $150, and if defendant accepted in full payment $100 in money and a secondhand scale, then, although defendant in fact only realized $25 net from selling the secondhand, in an accounting of realized profits must defendant account for an additional $25 of profits that it did not realize?

IV. At the end of the accounting period defendant had on hand 1839 infringing scales. Undoubtedly this was an advantage to defendant and a damage to complainant as competitive makers and sellers of automatic computing scales. But the proofs before the master proceeded on the basis that all of complainant's damages would be satisfied by an award of defendant's profits from the infringement. Complainant did not prove, as it might well have done, the market conditions after the close of the infringing period or what defendant did with the 1839 scales. We agree with the master that he was not required, on the state of the proofs, to speculate concerning potential or prospective profits. Robinson on Patents, Section 1139 (Note 2).

V. At the end of the accounting period defendant possessed a going business in cylinder scales, and the making of cylinder scales was then free for all. But no manufacturer who had respected the patent would be in such an advantageous position. Complainant, as a manufacturer of its originally patented scale, would have a good start and could probably maintain an easy lead over the law-abiders. Defendant's advantages by means of its infringement, its organized plant, its trained mechanics and salesmen, its scales in process of manufacture, its stock of materials, and its accumulated impetus from past advertising, are obvious. Equally obvious is the damage to complainant (as a manufacturer, not as a patentee who is entitled to exercise his right to exclude irrespective of his making the patented article) by having such a competitor unlawfully created. But, although infringement ended in 1912 and the matter of the money decree was not on until 1914, complainant came before the District Court and the master, not as a manufacturer that had been damaged as aforesaid, but solely as the owner of a franchise to exclude

others from practising the invention. And there was no evidence on which to make an assessment of such damages.

Assuming that complainant might be able on remandment to prove substantial damages under hearing IV or V or both, does equity require that this case, based on a patent issued in 1895, be now opened in order to permit complainant to better its hold? Though defendant has been in default since 1914, we conceive that, if the case is to be opened at all, it should be opened for both parties. And the final result might be the present result, by defendant's being able to make a true showing of profits which would be as much less than the master's present award as the amount of damages complainant might be able to prove for leftover scales and good will. On the whole we believe that the master has worked out substantial justice on the present record and that the time has now come for ending the litigation.

The decree is

AFFIRMED.

A true Copy.
Teste:

Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

And afterwards, on the same day, to-wit: On the fourth day of October, 1921, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, October 4, 1921. Decree Oct.

Court opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

Before:

Hon. Francis E. Baker, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.

Toledo Computing Scale Company
2784 *vs.*
The Computing Scale Company

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this court that the decree of the said District Court in this cause be, and the same is hereby affirmed with costs.

And afterwards, to-wit: On the second day of November, 1921, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Wednesday, November 2, 1921.

1921.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

Before:

Hon. Francis E. Baker, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.

Toledo Computing Scale Company
2784 *vs.*
The Computing Scale Company

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day comes Mr. Edward Rector, counsel for appellant, and presents a motion for stay of mandate in this cause, and the court having heard the same, it is ordered that the appellant file an additional bond in the sum of fifty thousand dollars ($50,000.00). It is further ordered that the mandate in this cause be, and the same is hereby stayed until the further order of this court.

And afterwards, to-wit: On the eighteenth day of November, 1921, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, November 18, 1921. Order Nov.

Court met pursuant to adjournment.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.

Before:

Hon. Francis E. Baker, Presiding Judge.

Toledo Computing Scale Company
2784 *vs.*
The Computing Scale Company
} Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day comes the appellant, the Toledo Computing Scale Company, and files its additional bond in the sum of fifty thousand dollars ($50,000.00), pursuant to the order of this court entered on the second day of November, 1921, which said bond is in the following words and figures, to-wit:

"KNOW ALL MEN BY THESE PRESENTS, That we, Toledo Scale Company, a corporation existing under and by virtue of the laws of the State of New Jersey, the corporate name whereof was formerly Toledo Computing Scale Company, as principal, and Fidelity and Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto The Computing Scale Company, a corporation, existing under and by virtue of the laws of the State of Ohio, in the full and just sum of Fifty Thousand Dollars ($50,000.) to be paid to the said The Computing Scale Company, its successors or assigns, to which payment well and truly to be made, we bind ourselves and our successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 15th day of November, 1921.

Whereas heretofore on March 5, 1919, at a session of the United States District Court for the Eastern Division of the Northern District of Illinois, in a suit pending in said court

between the said The Computing Scale Company, plaintiff, and the said Toledo Computing Scale Company, now Toledo Scale Company, defendant, a decree was rendered in favor of said plaintiff ordering and decreeing that said plaintiff have and recover of the said defendant, Toledo Computing Scale Company, now Toledo Scale Company, the sum of Four Hundred Twenty Thousand Eight Hundred Eighty-three and 44/100 Dollars ($420,883.44) together with interest thereon from the date of said decree until paid and also plaintiff's costs and disbursements to be taxed;

And Whereas the said Toledo Computing Scale Company, now Toledo Scale Company, defendant, prayed and was allowed an appeal from said decree to the said United States Circuit Court of Appeals for the Seventh Circuit;

And Whereas the said Toledo Computing Scale Company, now Toledo Scale Company, perfected its said appeal and filed in the said United States District Court for the Eastern Division of the Northern District of Illinois, its supersedeas bond in the sum of Four Hundred and Fifty Thousand Dollars ($450,000.);

And Whereas said decree was on the fourth day of October, 1921, affirmed by the judgment of the said United States Circuit Court of Appeals for the Seventh Circuit;

And Whereas the said Toledo Computing Scale Company, now Toledo Scale Company, has applied to the said United States Circuit Court of Appeals for the Seventh Circuit, for a stay of mandate herein, pending the determination of a petition by it to the Supreme Court of the United States for a writ of certiorari to the said United States Circuit Court of Appeals for the Seventh Circuit;

And Whereas, on account of the fact that the said bond of Four Hundred and Fifty Thousand Dollars ($450,000.) heretofore filed has become by the accumulation of interest insufficient in amount to secure the payment of said decree according to its terms, said United States Circuit Court of Appeals for the Seventh Circuit has made its order herein granting a stay of the mandate herein pending the determination of said petition for a writ of certiorari, upon condition that the said Toledo Computing Scale Comuany, now Toledo Scale Company, shall file an additional bond in the sum of Fifty Thousand Dollars ($50,000.) as additional security to secure the payment of the said decree according to its terms;

Now, the condition of the above obligation is such that if the said Toledo Computing Scale Company, now Toledo Scale

Company, shall prosecute its appeal to effect, and shall answer all damages and costs if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

TOLEDO SCALE COMPANY
By R. R. THEOBALD
Vice President.

(Seal)

Attest:
L. G. CHRISTMAN
Secretary.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND
By ARTHUR G. STANTEN
Attorney in Fact
B. H. CONKLING
Agent

(Seal)

O. K.
JOHN M. ZANE.

Approved: Nov. 18, 1921,
BAKER,
C. J."

It is now here ordered that the foregoing bond be, and the same is hereby approved.

3316

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 2153 to 2209 inclusive, contain a true copy of the proceedings had and papers filed (except the briefs of counsel) in the case of

Toledo Computing Scale Company

vs.

The Computing Scale Company

No. 2784, October Term, 1919, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this second day of November A. D. 1921.

EDWARD M. HOLLOWAY

(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

3318

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit begun and held in the United States Court room in the city of Chicago in said Seventh Circuit on the seventh day of October, 1919, of the October term in the year of our Lord one thousand nine hundred and nineteen and of our Independence the one hundred and forty-fourth.

And afterwards, to-wit: On the twentieth day of November, 1919, in the October term aforesaid, there was filed in the office of the clerk of this court a certain certified copy of an order extending time to docket and file record, which said certified copy of order is in the words and figures following, to-wit:

1921. IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division.

Tuesday, November 18, 1919.

Present: Hon. Kenesaw M. Landis, District Judge.

The Computing Scale Company, *Plaintiff*,
vs.
Toledo Computing Scale Company, *Defendant*.
} In Equity No. 30,024.

Pursuant to the stipulation of the parties hereto, it is ordered that the time of the respective parties hereto for filing of transcript of record on appeal and for docketing of their respective appeals be, and the same is hereby extended to and include December 1, 1919.

In the District Court of the United States of America,
For the Northern District of Illinois,
Eastern Division.
}

I, John H. R. Jamar, Clerk of the District Court of the United States of America for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of an order made and entered in said Court on the 18th day of November, A. D. 1919, as fully as the same appears of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District, this 18th day of November, A. D. 1919.

JOHN H. R. JAMAR,
Clerk.

(Seal)

Endorsed: Filed Nov. 20, 1919. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the twentieth day of December, 1919, in the October term last aforesaid, came the appellant, by its counsel, Mr. Charles F. Morse and Mr. John M. Zane, and filed in the office of the clerk of this court their appearance, which appearance is in the words and figures following, to-wit:

Appe
ap
fil
191

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 2777 October Term, 1919.

The Computing Scale Co.,
Appellant,

vs.

Toledo Computing Scale Co.,
Appellee.

The Clerk will enter my appearance as counsel for the appellant.

CHARLES F. MORSE
JOHN M. ZANE.

Endorsed: Filed Dec. 20, 1919. Edward M. Holloway, Clerk.

And afterwards, to-wit: On the ninth day of January, 1920, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Friday, January 9, 1920.

20.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:
Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

Before:
Hon. Evan A. Evans, Circuit Judge.

The Toledo Computing Scale Company
2777 *vs.*
The Computing Scale Company

The Computing Scale Company
2784 *vs.*
The Toledo Computing Scale Company

Appeals from the District Court of the United States for the Northern District of Illinois, Eastern Division.

In the above entitled causes, it appearing that the first entitled cause is an appeal and the second entitled cause is a cross appeal from the same decree of the lower court, it is ordered that the said appeals be heard for argument and submission at the same time, and that The Computing Scale Company may file upon both of said appeals for said hearing one brief, which shall be a brief in reply to the Toledo Computing Scale Company's brief upon its appeal and also a brief upon the errors assigned by The Computing Scale Company upon its cross appeal that the Toledo Computing Scale Company shall first file its brief upon its said appeal, and thereafter The Computing Scale Company shall file its brief in reply, containing also its brief upon its cross appeal, and that thereafter the Toledo Computing Scale Company shall file its reply brief, all briefs to be filed within the times fixed by the rules of this Court or such extensions thereof as may be granted by the Court, and that upon the consolidated hearing of said appeal The Computing Scale Company shall be entitled, as provided by the rules of this Court, to the opening and closing of the argument as the complainant in the Court

below, from which said appeals are taken, and that both said appeals shall be heard upon the same printed record containing the transcripts on both of said appeals.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court room, in the city of Chicago, in said Seventh Circuit on the fifth day of October 1920, of the October term in the year of our Lord one thousand nine hundred and twenty and of our Independence the one hundred and forty-fifth.

And afterwards, to-wit: On the fourth day of January, 1921, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Tuesday, January 4, 1921.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

The Computing Scale Co.
2777 *vs.*
Toledo Computing Scale Co.

} Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the court that this cause be, and the same is hereby set down for hearing on February 4, 1921.

And afterwards, to-wit: On the fourth day of February, 1921, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

Friday, February 4, 1921.

21.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

Before:

Hon. Francis E. Baker, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.

The Computing Scale Company
2777 *vs.*
Toledo Computing Scale Company

} Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. John M. Zane, counsel for appellant, and by Mr. Edward Rector and Mr. Frederick P. Fish, counsel for appellee, and the court having heard the same takes this matter under advisement.

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court room, in the city of Chicago, in said Seventh Circuit, on the fourth day of October 1921, of the October term in the year of our Lord one thousand nine hundred and twenty-one and of our Independence the one hundred and forty-sixth.

And afterwards, to-wit: On the fourth day of October, 1921, in the October term last aforesaid, there was filed in the office of the clerk of this court the Opinion of the court, which said

Opinion is not copied here, as the same appears in the proceedings of this court in cause No. 2784, Toledo Computing Scale Company vs. The Computing Scale Company, certified herewith.

And afterwards, on the same day, to-wit: On the fourth day of October, 1921, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit: Dec 0

Tuesday, October 4, 1921.

Court opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

Before:

Hon. Francis E. Baker, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.

2777 The Computing Scale Company *vs.* Toledo Computing Scale Company } Appeal from the District Court of the United States for the Northern District of Illinois. Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this court that the decree of the said District Court in this cause be, and the same is hereby affirmed with costs.

3326

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 2213 to 2219, inclusive, contain a true copy of the proceedings had and papers filed (except the opinion of the court and the briefs of counsel) in the case of

The Computing Scale Company

vs.

Toledo Computing Scale Company

No. 2777, October Term, 1919, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this second day of November A. D. 1921.

EDWARD M. HOLLOWAY

(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

Office Supreme Court, U. S.
FILED
APR 20 1922
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

October Term 1921. No. 8[redacted]389

TOLEDO SCALE COMPANY,

Petitioner,

vs.

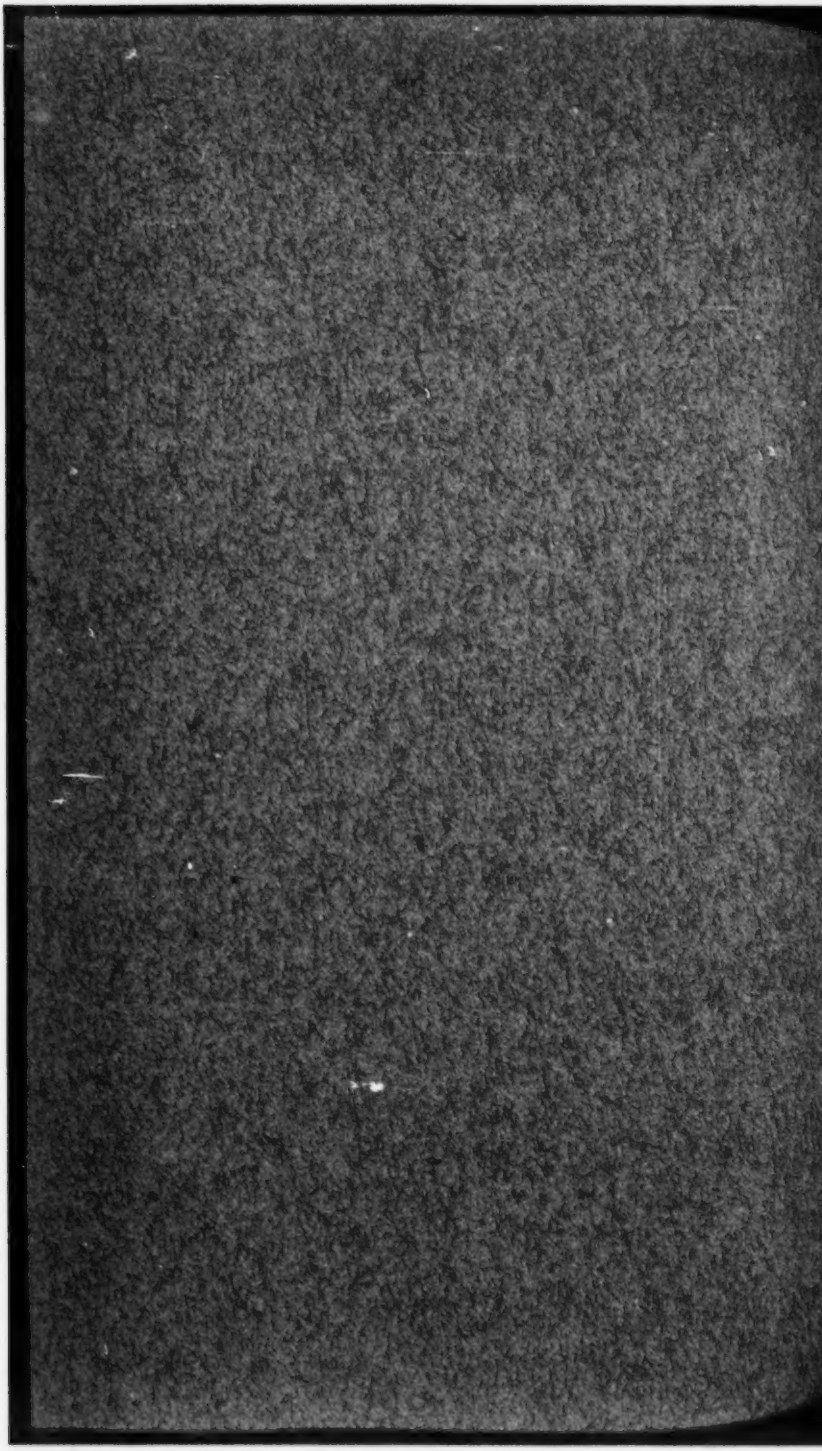
THE COMPUTING SCALE COMPANY,

Respondent.

MOTION FOR STAY

BROWN, GEDDES, SCHMETTAU & WILLIAMS,
TRACY, CHAPMAN & WELLES,
Counsel for Petitioner.

HARRY W. MORGAN,
GEORGE D. WELLES,
Of Counsel.



IN THE

Supreme Court of the United States

October Term 1921. No.——

TOLEDO SCALE COMPANY,

Petitioner,

vs.

THE COMPUTING SCALE COMPANY,

Respondent.

MOTION FOR STAY

TO THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Toledo Scale Company, respectfully shows:

1. The mandate of the Circuit Court of Appeals for the Seventh Circuit has been stayed by that Court only up to and including April 26, 1922, upon condition that by said date your petitioner give bond in the amount of Twenty-five Thousand Dollars

($25,000.00) to secure the performance and for payment of all of the provisions in said mandate if and when petitioner's application to the Supreme Court for writ of certiorari, prohibition or mandamus shall be denied. Petitioner's separate petition for prohibition and mandamus was denied without prejudice by this court on April 17, 1922.

2. Petitioner has not given said bond and is advised that it cannot give same without jeopardizing its rights under the injunction obtained by it in the District Court in Ohio. The petitioner has heretofore given bonds in the amount of Five Hundred Thousand Dollars ($500,000), which are ample to secure the decree of the District Court which was affirmed by said Circuit Court of Appeals, together with interest thereon which may accumulate while this Court is considering petitioner's petition for the issuance of a writ of certiorari.

3. Petitioner has advised the Circuit Court of Appeals of the action of this Court upon petitioner's separate petition for prohibition and mandamus, and has further advised said Circuit Court of Appeals of petitioner's intention to file herein on April 20, 1922 the petition for certiorari which was on said date filed herein. Petitioner has made application to said Circuit Court of Appeals that its order of stay be so modified as that the bond to be given by

petitioner shall be conditioned, "to secure the performance and for payment of all the provisions in said mandate" if the Supreme Court shall grant petitioner's petition for certiorari, and upon hearing shall affirm said mandate, or that said bond be conditioned to secure the payment of the decree of the District Court entered March 5, 1919, together with interest and costs if said petition for certiorari shall be denied or if said mandate shall be affirmed by the Supreme Court, but the Circuit Court of Appeals has declined so to do. Petitioner is ready, willing and able to give bond for Twenty-five Thousand Dollars ($25,000.00) in accordance with its suggestion to the Circuit Court of Appeals.

4. If said mandate issues, there will be a direct conflict between the injunction which the District Court for the Northern District of Illinois, Eastern Division will issue in obedience to said mandate, and the injunction heretofore issued by the United States District Court for the Northern District of Ohio Western Division.

Wherefore, petitioner respectfully prays for the issuance of an order staying further proceedings in said Circuit Court of Appeals until futher order of this Court conditioned upon this petitioner giving bond in accordance with its suggestion above set forth or

upon such other terms as this Court shall deem proper.

TOLEDO SCALE COMPANY,

BROWN, GEDDES, SCHMETTAU & WILLIAMS,
TRACY, CHAPMAN & WELLES,
Counsel for Petitioner.

HARRY W. MORGAN,
GEORGE D. WELLES,
Of Counsel.

STATE OF OHIO, LUCAS COUNTY, SS.

GEORGE D. WELLES, being first duly sworn, upon his oath says that he is one of counsel for the Toledo Scale Company; that he is familiar with the facts set forth in the foregoing motion and that said facts are true as he verily believes.

GEO. D. WELLES,

Sworn to before me and subscribed in my presence this 19th day of April, 1922.

SEAVEY E. C. MOORE,
Notary Public, Lucas County, Ohio.

Office Supreme Court, U. S.
FILED
OCT 3 1922
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 891 339

TOLEDO SCALE COMPANY,
Petitioner,

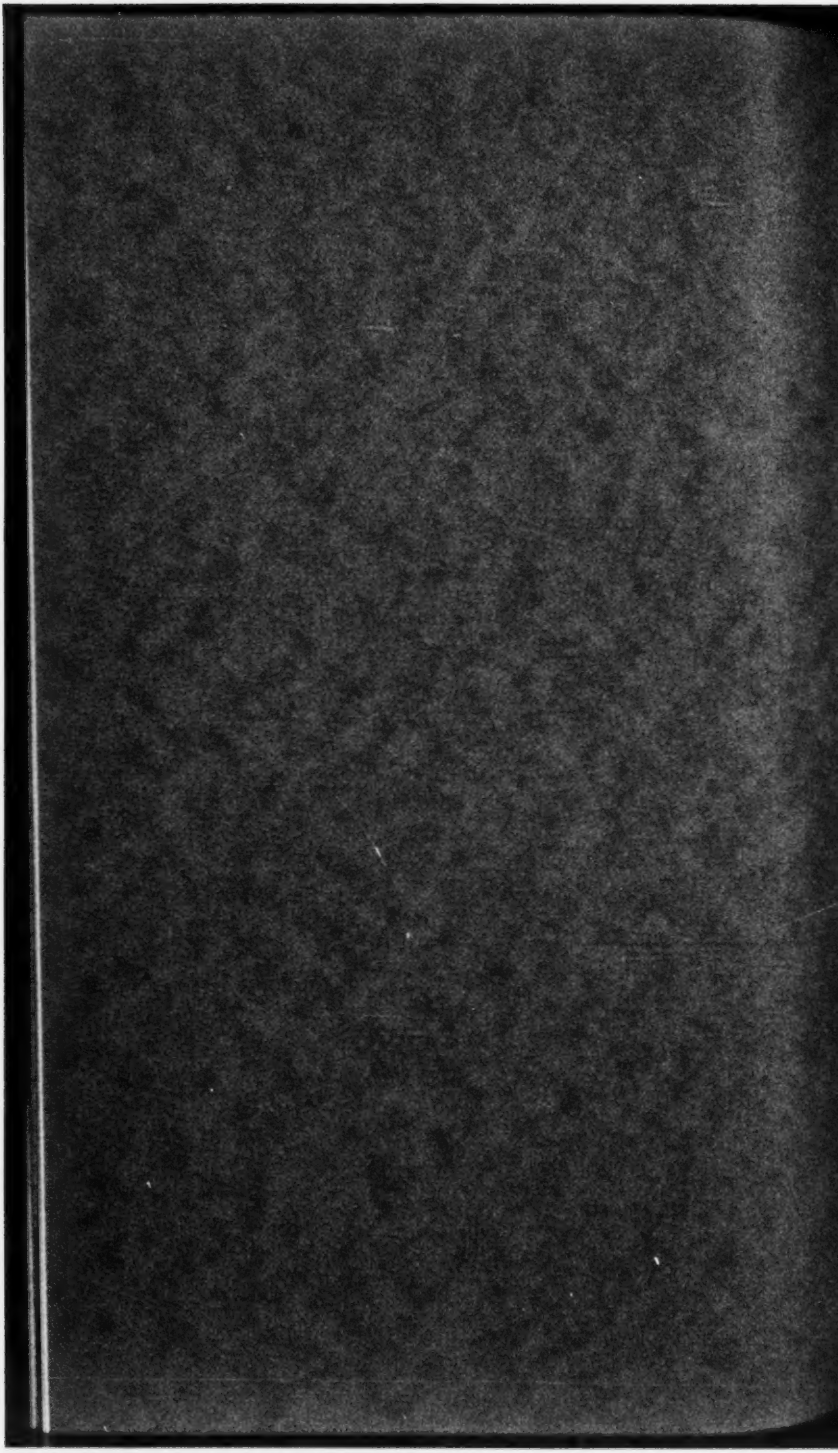
vs.

THE COMPUTING SCALE COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SUGGESTIONS OF RESPONDENT IN ANSWER TO MOTION OF PETITIONER FOR LEAVE TO TAKE TESTIMONY.

JOHN M. ZANE,
CHARLES F. MORSE,
HAROLD W. NORMAN,
Solicitors for Respondent.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 891.

TOLEDO SCALE COMPANY,

Petitioner,

vs.

THE COMPUTING SCALE COMPANY.

Respondent.

SUGGESTIONS OF THE COMPUTING SCALE COMPANY IN ANSWER TO MOTION OF TOLEDO SCALE COMPANY FOR LEAVE TO TAKE TESTIMONY.

The Computing Scale Company by its solicitors, whose names are hereunto subscribed, respectfully suggests that the motion of the Toledo Scale Company for leave to take testimony in the cause of Toledo Scale Company, Plaintiff, *vs.* The Computing Scale Company, *et al.*, Defendants, in the District Court of the United States for the Northern District of Ohio, Western Division, in equity, should be denied upon the following grounds:

1. This Honorable Court, neither by appeal nor by certiorari nor otherwise, has any present jurisdiction to make any order in this cause applying to said cause

in said District Court for the Northern District of Ohio, for the reason that said cause is not now pending either by way of appeal or by certiorari in this Court, nor is about to be so pending, nor is any appeal or petition for writ of certiorari about to be taken or made to this Court.

The cause of Toledo Scale Company, Petitioner, *vs.* The Computing Scale Company, Respondent, in this Court, in which said cause this motion is made, is upon writ of certiorari granted to the United States Circuit Court of Appeals for the Seventh Circuit to bring up for review a certain order made on March 25, 1922, after final judgment by said Circuit Court of Appeals, finding the Toledo Scale Company in contempt of said Circuit Court of Appeals in bringing said cause in said Ohio District Court, and ordering its mandate to be issued directing the District Court of the Northern District of Illinois to enjoin the Toledo Scale Company from further proceeding in the said cause in the said District Court of Ohio, to the taking of evidence in which this motion for leave is addressed.

The said Circuit Court of Appeals had stayed its said mandate when its said order was made for the purpose of allowing the Toledo Scale Company to petition this Court for a writ of certiorari, and this Court thereafter entered its order staying further proceedings in said Seventh Circuit Court of Appeals and on May 29, 1922, granted the writ of certiorari to said Circuit Court of Appeals upon said order.

In the suit in the said District Court of Ohio, the Court had granted, on March 13, 1922, a temporary injunction restraining The Computing Scale Company from enforcing either in said Seventh Circuit Court of Appeals or the said District Court of the Northern District of Illinois, Eastern Division, a decree obtained by

The Computing Scale Company against the Toledo Scale Company, and from that injunctional order in said District Court of Ohio, an appeal was taken to the United States Circuit Court of Appeals of the Sixth Circuit and said appeal is now there pending, briefs have been filed on both sides, and the case will be heard at the October term, 1922, of the said Sixth Circuit Court of Appeals.

No steps of any kind have been taken to invoke the jurisdiction of this Court over the said cause in said District Court of Ohio, or over the said cause in the said Sixth Circuit Court of Appeals.

In view of these facts it is apparent that the jurisdiction of this Court cannot be invoked for the making of an order to apply in the Ohio cause, and this Court has no control over the taking of testimony in the Ohio Court, and the jurisdiction of this Court is confined to a review of the proceeding to review which the writ of certiorari was granted.

2. The reasons urged in support of the motion are so general and indefinite that they show no adequate ground for the motion. Such a motion should give the names and addresses of the witnesses and sufficient information to determine the relevancy and competency of the testimony sought to be taken and the immediate necessity for the taking of testimony of particular witnesses by some specific statement as to the situation of those particular witnesses.

Especially in such a case as this is this matter of importance. The decree of the Illinois District Court whose enforcement has been enjoined by the Ohio District Court has been twice affirmed by the Seventh Circuit Court of Appeals, and to the final judgment of said Seventh Circuit Court of Appeals, certiorari was denied

by this Honorable Court on January 9, 1922, and said Seventh Circuit Court of Appeals thereafter had decided the proceedings in the Ohio District Court to be without jurisdiction and without merit, and the order of the Ohio District Court is now being attacked in the Sixth Circuit Court of Appeals and that court is asked upon appeal by The Computing Scale Company to reverse the order granting the temporary injunction and to order the Ohio District Court to dismiss the cause therein, (1) because of want of jurisdiction of the person of The Computing Scale Company, (2) because of want of jurisdiction of the subject matter, (3) because of *laches* appearing on the face of the bill of complaint, (4) because of a *res judicata* of the issues raised by the bill, and (5) because of the failure of the bill to state a cause of action in equity. These matters are soon to be decided by the Circuit Court of Appeals for the Sixth Circuit. It is apparent that if any of the foregoing contentions of The Computing Scale Company should be sustained by the Circuit Court of Appeals for the Sixth Circuit, there would be no occasion to take any testimony in the suit.

In such a situation the Circuit Court of Appeals for the Sixth Circuit would be asked to stay the taking of testimony in the Ohio District Court, if it should be attempted and the Sixth Circuit Court of Appeals ought not be embarrassed in passing on a motion to stay further proceedings in the Ohio District Court under the Circuit Court of Appeals Act (Sec. 129 Judicial Code) by a permission to take testimony granted by this Court in another cause.

The matter ought not in justice to be so far prejudged as to grant to the Toledo Scale Company the privilege of taking testimony anywhere and to expose The Com-

puting Scale Company to great expense and labor, in a cause where, so far as yet appears, the Ohio District Court is proceeding wholly without jurisdiction.

WHEREFORE, The Computing Scale Company prays that the said motion may be denied.

THE COMPUTING SCALE COMPANY,
By JOHN M. ZANE,
CHARLES F. MORSE,
HAROLD W. NORMAN,
Its Solicitors.

STATE OF ILLINOIS
COUNTY OF COOK } ss.

JOHN M. ZANE, of Chicago, Illinois, a member of the bar of the Supreme Court of the United States, being first duly sworn on oath says, that he is one of the solicitors above named and that the facts above stated are true, as he verily believes.

John M. Zane

Subscribed and sworn to before me this 28th day of September, 1922.

Blanche M. Comey
notarial seal
Notary Public.

my commission expires
July 27, 1924

FILED
OCT 2 1922
WM. R. STANSBURY
Clerk

IN THE

Supreme Court of the United States

October Term, 1922

No. 339

TOLEDO SCALE COMPANY,
Petitioner,

vs.

THE COMPUTING SCALE COMPANY,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE TO FILE PETITION

In the October Term, 1922

No. 339

TOLEDO SCALE COMPANY,
Petitioner,

vs.

THE COMPUTING SCALE COMPANY,
Respondent.

In The

Supreme Court of the United States

NO. 339.

October Term, 1922

TOLEDO SCALE COMPANY,

Petitioner,

vs.

THE COMPUTING SCALE COMPANY,

Respondent.

STATE OF OHIO, LUCAS COUNTY, ss,

GEORGE D. WELLES, being first duly sworn, upon his oath says that Toledo Scale Company especially desires to take the testimony of James Shephard, who is over eighty-three years of age, John H. Devlin, who is over sixty-seven years of age, Albert U. Smith, who is over sixty-two years of age, Thomas Z. Phinney, who is over sixty-one years of age and Ira Chase Koehne, who is over fifty years of age, in the cause referred to in said motion.

Toledo Scale Company expects to show by the testimony of said witnesses that the inventor, Phinney, manufactured and placed in commercial usage many years prior to the application for the Smith patent in controversy herein, a scale having a light-weight skeleton cylinder covered with paper, which was a complete anticipation of the scale described in the Smith application for patent, and Toledo Scale Company expects to show particularly by the testimony of Ira Chase Koehne, Thomas Z. Phinney and Albert U. Smith, with certain corroborating testimony from James Shepard, that The Computing Scale Company had full knowledge of the fact that the Phinney scale was an anticipation of said Smith patent in controversy herein, and that

The Computing Scale Company deliberately searched for all of said Phinney scales with the intention of obtaining possession thereof and of secreting the same for the purpose of depriving Toledo Scale Company of the opportunity to learn of said scales and of the opportunity to produce any of the same in evidence, and that The Computing Scale Company carried said intent into effect so far as lay within its power, and that it did obtain possession of and secrete from Toledo Scale Cmpany all of said Phinney scales, with the exception of one or two.

Toledo Scale Company expects to prove by the testimony of said Ira Chase Koehne, with corroborating testimony in certain respects from certain other of said witnesses, that The Computing Scale Company conducted several searches for said scales, and that one of said searches, at least, was made for the express purpose of preventing Toledo Scale Company from making a defense based on said Phinney scales in this present litigation, and with the express purpose on the part of said The Computing Scale Company of imposing upon the Courts in this suit and deceiving the Courts with respect to the actual facts as to who first used a light-weight skeleton cylinder in computing scales.

Affiant is informed and believes that said Thomas Z. Phinney and said Ira Chase Koehne are not in robust health; that said Thomas Z. Phinney is obliged to and does go South every winter in the effort to benefit his health, and that said Ira Chase Koehne has suffered during the past summer with heart-trouble.

Affiant is informed and believes that Toledo Scale Company has already lost by death, the benefit of the testimony of William M. Raymond in said suit in the District Court of Ohio. The affidavit of said Raymond was obtained in this cause on May 14, 1913, but affiant is informed and believes that said Raymond has since died.

Affiant further says that the testimony of Ira Chase Koehne goes directly to the claim of fraud asserted by Toledo Scale Company, said Koehne having been an employee of The Computing Scale Company at the time said fraud was perpetrated, and having personal knowledge with respect to the fraudulent conduct of The Computing Scale Company.

Affiant further says that the testimony of other witnesses, whose affidavits appear in the record herein, is of importance to Toledo Scale Company.

Geo. D. McCabe

Sworn to before me and subscribed in my presence this 30th day of September 1922.

Randolph P. Whitehead
Notary Public, Lucas County, Ohio.

Notarial Seal

IN THE

Supreme Court of the United States

No. 891

October Term, 1921

TOLEDO SCALE COMPANY,

Petitioner,

vs.

THE COMPUTING SCALE COMPANY,

Respondent.

MOTION FOR LEAVE TO TAKE TESTIMONY

Now comes Toledo Scale Company and respectfully shows the court that the order proposed to be entered by the Circuit Court of Appeals for the Seventh Circuit, which has been stayed by this court, was an order directing the issuance of an injunction restraining Toledo Scale Company from further maintaining the suit in the United States District Court for the Northern District of Ohio, Western Division wherein Toledo Scale Company is plaintiff and The Computing Scale Company is defendant; that said suit in the Northern District of Ohio is one in which Toledo Scale Company seeks to restrain The Comput-

ing Scale Company from enforcing a decree obtained by it against Toledo Scale Company on the ground that The Computing Scale Company was guilty of fraud in deliberately secreting, suppressing and concealing evidence material to the defense of Toledo Scale Company to the claims asserted by The Computing Scale Company in said cause in said Seventh Circuit. That certain of the witnesses whose evidence will be of vital importance to Toledo Scale Company in said suit in said District Court for the Northern District of Ohio, Western Division, are of advanced age and in feeble health and that there is grave danger that Toledo Scale Company may lose the benefit of their evidence if the taking of such evidence is delayed until after the proceedings in this court shall have been disposed of. Said Toledo Scale Company is desirous of proceeding to take such evidence forthwith and is advised that in view of the pendency of the proceedings herein, proper respect for this court requires application to this court to be made for leave to take such evidence.

WHEREFORE Toledo Scale Company moves the court for leave to proceed forthwith to take such evidence as it may be advised is necessary and proper on its behalf in said cause now pending in the Northern District of Ohio, Western Division, entitled Toledo Scale Company, Plaintiff, vs. The Computing Scale

Company, et al., Defendants, being cause No. 307 on the equity docket of said court.

TOLEDO SCALE COMPANY,
BY TENNEY, HARDING & SHERMAN
BROWN, GEDDES, SCHMETTAU & WILLIAMS
TRACY, CHAPMAN & WELLES
Its Solicitors

HORACE KENT TENNEY
HARRY W. MORGAN
GEO. D. WELLES
Of Counsel

STATE OF OHIO, LUCAS COUNTY, ss.

GEORGE D. WELLES, being first duly sworn, upon his oath says that he is one of the solicitors for Toledo Scale Company; that he is familiar with the statements made and allegations contained in the foregoing motion, and that the same are true as he verily believes.

GEORGE D. WELLES

Sworn to before me and subscribed in my presence this 20th day of September, 1922.

SEAVEY E. C. MOOR
Notary Public, Lucas County, Ohio.

Office Supreme Court, U. S.
FILED
MAR 15 1923
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 339

TOLEDO SCALE COMPANY,

Petitioner,

vs.

THE COMPUTING SCALE COMPANY,

Respondent.

BRIEF OF RESPONDENT.

JOHN M. ZANE,
CHARLES F. MORSE,
DRURY W. COOPER,
Counsel for Respondent.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 339

TOLEDO SCALE COMPANY,

Petitioner,

vs.

THE COMPUTING SCALE COMPANY,

Respondent.

BRIEF OF RESPONDENT.

STATEMENT OF FACTS.

The petition for a writ of certiorari in this case assigned error upon and asked a review of a certain decree of the Circuit Court of Appeals of the Seventh Circuit entered on March 25, 1922 (Printed Rec., 489) and prayed the certification of the record of said Seventh Circuit Court of Appeals made since January 9, 1922, the date of this Court's denial of a former petition for a certiorari by Toledo Scale Company. (See petition, filed April 20, 1922, pp. 34-36.) This decree of the Seventh Circuit Court of Appeals to be reviewed was one made upon an ancillary petition of The Computing Scale Com-

pany after the final affirmance on October 4, 1921 (Printed Rec., red paging, 3311) of a final decree of the Northern District Court of Illinois, Eastern Division, but while the mandate of said Court of Appeals was stayed. (Printed Rec., red paging, 3312.) The decree of March 25, 1922, was made under the following circumstances:

Immediately upon denial by this Court of said first petition for certiorari to the final affirmance, and on the same day, the Toledo Company had filed in the District Court of the Northern District of Ohio, Western Division, a bill in equity, praying a temporary restraining order without notice, a preliminary injunction, and, upon final hearing, a perpetual injunction against the enforcement of said final decree in said Illinois District Court, or any decrees of the United States Circuit Court of Appeals for the Seventh Circuit, upon any appeals in said cause, and praying the cancellation of the supersedeas bonds given on said final decree. (Printed Rec., 31, 32.)

Said final decree of said Illinois District Court, affirmed October 4, 1921, was a decree upon an accounting for infringement of a patent. Of said final decree said Seventh Circuit Court of Appeals then had and now has jurisdiction exclusive of said District Court which rendered it, by reason of the pendency of said appeal and of the fact of mandate not issued.

Upon the filing of said bill of complaint on January 9, 1922, the Ohio District Court had issued without notice a temporary restraining order (Printed Rec., 41), enjoining The Computing Company from enforcing or attempting to enforce in any manner whatsoever the said final decree or said supersedeas bonds, or from in any manner asserting any right or claim under the decree of said Seventh Circuit Court of Appeals affirming the said final decree. (Printed Rec., 41.)

After successive continuances of said restraining order in the Ohio court, The Computing Company on February 10, 1922, filed in the Seventh Circuit Court of Appeals its petition in the nature of an ancillary bill, setting forth the proceedings in said Ohio District Court alleging them to be contrary to the adjudication of said Court of Appeals and without jurisdiction and a contempt of said Court of Appeals and praying relief against said Toledo Scale Company in regard thereto. (Printed Rec., 3-10.)

Thereupon while said ancillary bill was pending upon order to show cause in the Seventh Circuit Court of Appeals, the said Ohio District Court, on February 13, 1922, converted its temporary restraining order into a preliminary injunction. (Printed Rec., red paging, 442; Opinion, Printed Rec., 417.)

Thereafter the Toledo Company made its answer in said Seventh Circuit Court of Appeals to the ancillary bill (Printed Rec., 228), and hearing was had upon said ancillary bill and answer on March 7, 1922. Said Seventh Circuit Court of Appeals thereafter entered its decree of March 25, 1922, which is complained of in this certiorari. (Printed Rec., 489.) On the hearing (Printed Rec., 477, 478) the court granted to The Computing Company leave to file the certified copy of the order of this, the Supreme Court, of January 9, 1922, denying the former petition for writ of certiorari.

The decree complained of (Printed Rec., 489; Opinion, Printed Rec., 478) directed a mandate to issue to said Illinois District Court directing that court (1) to enter of record the affirmance of said final decree. (2) To enjoin Toledo Scale Company from further maintaining its Ohio bill and from filing a similar bill elsewhere. (3) To enter summary decree against the sureties upon the superse-

deas bonds. (4) To ascertain The Computing Company's expenses in the litigation since said denial of certiorari on January 9, 1922, and to enter decree therefor against Toledo Scale Company but not against said sureties.

The facts will appear in the three opinions of the Seventh Circuit Court of Appeals,

Toledo Computing Scale Co. v. *Computing Scale Co.* 208 Fed. 410,

Computing Scale Co. v. *Toledo Scale Co.* 279 Fed. 648,

Toledo Scale Co. v. *Computing Scale Co.* 281 Fed. 488.

These facts we now set forth in chronological order.

In May, 1910, The Computing Scale Company filed its bill of complaint in said Illinois District Court. It alleged ownership of reissued patent No. 11,536, dated September 3, 1895, original, reissued in 1896, and patent No. 597,300 and alleged infringement thereof by Toledo Company. (Printed Rec., red paging, 512-522.) The infringed patent No. 11,536 was for an indicator drum computing scale. (Printed Rec., 1174.) The application of the inventor for said Reissued patent pleaded, showed that computing scales had theretofore been constructed with a drum or cylinder (Printed Rec., 1173), but that such scales would not weigh correctly and explained why this had been due to the drum itself.

The file wrapper of the patent showed that in the Patent Office there was cited against the granting of the Reissued patent, an old Patent No. 106,869 to William H. Phinney of Pawtucket, R. I. (Printed Rec., red paging, 1014.) The reissued patent was thereafter allowed by the Patent Office. (Printed Rec., red paging, 1016.)

The Toledo Company, in August 1910, filed its answer

to said infringement bill and denied ownership of the patent and denied infringement and alleged (1) that the said invention had been patented and described in U. S. Letters Patent No. 106,869 granted to William H. Phinney on August 30, 1870 (Printed Rec., red paging, 533), and (2) that the alleged invention described and claimed in said Reissued Letters Patent "was publicly used and offered for sale and sold by various persons at various places within the United States, and among others at Pawtucket, Rhode Island, by William H. Phinney." (Printed Rec., 532.)

A long taking of testimony by depositions took place upon the issues in the said infringement suit. (Printed Rec., red paging, 511-1421.) The Phinney patent was introduced in evidence (Printed Rec., red paging, 1183), and was relied upon as a complete anticipation of the reissued Letters Patent No. 11,536 in suit. The file wrapper of the patent, No. 11,536, was also in evidence. (Printed Rec., red paging, 1002-1017.) The investigator of the Toledo Company, Burkholder (Printed Rec., 821), testified that before the trial he found out about the Phinney patent but did not make any investigation to find out what had been done along the line of that patent. (Printed Rec., 827.) The Toledo Company's expert, Culmer, stated that he had built a Phinney scale after the patent, but that he could not succeed in getting it to stop twice within one ounce of the same weight, and that he knew of no other scale than the Dayton scale that was computing (Printed Rec., red paging, 619), and that a scale which would not register twice alike was not a commercial article. (Printed Rec., red paging, 620.) There was other evidence from various witnesses to show that the Smith Reissued patent scale of the Dayton Company (The Computing Scale Company) was the only computing scale being used in 1897, and such was

the condition when The Computing Scale Company bought Reissued Patent No. 11,536 in 1899. The affidavit of Davis afterwards filed showed that he investigated at Washington the Phinney patent, as will later appear.

The cause was heard and submitted and on June 25, 1912, the Illinois District Court rendered its decree finding validity of both patents, infringement thereof, granting a permanent injunction and ordering an accounting. (Printed Rec., red paging, 1148-1150.)

Thereupon an appeal was taken to the Seventh Circuit Court of Appeals (Printed Rec., red paging, 1151), the appeal was perfected and the injunction in the decree was suspended upon the Toledo Company's petition. (Printed Rec., 1157, 1162, 1165.)

The Reissued patent expired September 3, 1912. In said Circuit Court of Appeals the appealed cause was set for hearing January 21, 1913 (Printed Rec., 1370), and on that day the said appeal cause was argued, submitted and taken under advisement. (Printed Rec., 1371.) On the same day the Toledo Company moved that its appeal as to Reissued Patent No. 11,536 be dismissed with leave to introduce newly discovered evidence as to the Phinney scale in the District Court for the Northern District of Illinois, which motion was denied. (Printed Rec., 1371.)

On April 15, 1913, the Seventh Circuit Court of Appeals, Judges Baker, Kohlsaat and Wright, rendered an opinion (208 Fed. 410; Printed Rec., red paging, 1672) holding Reissued Patent No. 11,536 valid and infringed but holding the other patent invalid and remanding the cause to the Illinois District Court to allow the plaintiff to introduce proper proof of title of the infringed patent and so decreed. (Printed Rec., 1378, 1379.)

The grounds of finding validity were that Smith had invented the first usable automatic computing scale, that there had been other scales with drums but that when put into bodily form they would not weigh twice alike, and that Smith had discovered how to build such a scale by reorganizing the old elements so that the scale would weigh correctly, that this discovery was not a mere question of degree but was the difference between success and failure, that the Reissued patent was properly issued because, while the invention was covered in the application for patent, Smith's claim covered only the particular mechanism for weighing, while the reissued patent covered the indicator drum with any kind of a weighing mechanism, and since the value of Smith's invention was not in any way dependent upon the particular counterbalancing part of the scale, he was entitled to claims as broad as the original invention shown in his application, when the rights of no third parties had intervened. (Printed Rec., red paging, 1372-1378.)

Thereupon on May 14, 1913 (Printed Rec., red paging, 1413), within the thirty days' stay of mandate allowed for a petition for rehearing, the Toledo Company presented its second motion in the nature of a bill of review, whereby the Seventh Circuit Court of Appeals, upon affidavits setting forth the newly discovered evidence, and claimed diligence, was prayed to include in its mandate to the District Court permission to said District Court to entertain and consider, and if so advised, to grant an application of the Toledo Company for leave to introduce proofs in said cause respecting computing scales alleged to have been manufactured and sold and introduced into use by William H. Phinney of Pawtucket, Rhode Island, two years prior to the date of the invention in the reissued Letters Patent in suit, and to rehear

said cause on such additional proofs. As a basis for said bill of review the Toledo Company submitted the affidavits of Henry Theobald, Frank Parker Davis, Edward N. Pagelsen, Harry B. Sherwood, Bert W. King, Thomas Z. Phinney, E. Willard Horton, William M. Raymond, John H. Devlin, William H. Gillan, James A. Shepard, George Walker and Ralph B. Evans, and the Toledo Company submitted therewith three of such Phinney scales and a drum of a fourth, as both the Ohio District Court in its opinion (Printed Rec., red paging 455), and the Court of Appeals in its opinion found (Printed Rec., 485-487), and the proof so showed. (Printed Rec., red paging 1379-1412.) These affidavits set forth certain alleged evidence claimed to show that the said Phinney had made and sold scales described in his patent, setting forth circumstances claimed to show diligence, and that knowledge of the manufacture of scales under the Phinney patent in evidence in the cause had come to the Toledo Company within the then last three months. (Printed Rec., red paging, 1385.) These affidavits charged that specimens of such Phinney scales had been bought up by The Computing Scale Company, that other Phinney scales had been suppressed by it, and depositions suppressed and not put on file and that it had knowledge of the commercial use of Phinney scales at different periods between 1870 and 1909. The affidavit of Davis showed an investigation of the Phinney patent for the Toledo Company prior to the trial, but no inquiry whatever at Pawtucket, and that as soon as inquiry was made at Pawtucket the alleged newly discovered evidence of Phinney alleged commercial use was ascertained without difficulty. (Printed Rec., red paging, 1387, 1388.) The affidavits charged that The Computing Company in an infringement suit at Philadelphia in 1901 had gained knowledge of such Phinney scales, and that in that liti-

gation the solicitors for the opposite party had produced a number of such Phinney scales (Printed Rec., red paging, 1394), but that it had made arrangements to suppress such Phinney scales as exhibits and the depositions (Printed Rec., 186, 1412); that The Computing Company at its Dayton factory had at least four of such Phinney scales in 1909 (Printed Rec., red paging, 1396); that three Phinney scales had been bought up from Phinney by representatives of the predecessor of The Computing Company (Printed Rec., 1401), and that Mr. Howson at Philadelphia, the attorney for the opposite party to The Computing Company in the litigation at Philadelphia, had a collection of such Phinney scales (Printed Rec., red paging, 1401), and that in the litigation at Philadelphia in 1901, The Computing Company had attempted to suppress knowledge of such scales by getting the exhibits turned over to its counsel and had kept the depositions off the record, and by such facts the Toledo Company had been prevented from earlier finding the evidence as to Phinney's use of the invention. (Printed Rec., red paging, 1412.)

The petition of the Toledo Scale Company shows that it was represented to the court that the Toledo Company had no knowledge whatever of the manufacture and sale of said Phinney scales, but that The Computing Company had such knowledge for more than ten years prior to 1913 (Printed Rec., 185) and that the depositions of the witnesses in the Philadelphia case were withdrawn or withheld from the files of the court and the old Phinney scales introduced in evidence, were turned over to The Computing Company's counsel and remained in the possession of said counsel or of The Computing Company itself. (Printed Rec., 185, 186.)

These affidavits practically word for word were refiled in the Ohio District Court with the bill for injunction. (Printed Rec., 150-183.) They showed that Phinney had made in all about twenty scales (Printed Rec., 61) and the affidavits showed the disposition of those scales as will later appear in this statement of facts.

The court, Judges Baker, Seaman and Carpenter, denied this application for review (Printed Rec., red paging, 1413) and such an application to a Court of Appeals is by this Court treated as a bill of review. (*National Brake Co.* v. *Christensen*, 254 U. S. 425; *Hart Steel Co.* v. *Railway Supply Co.* 244 U. S. 294.)

The cause went back to the District Court upon the mandate of validity and infringement of the reissued patent No. 11,536 and to allow proof of title. The Computing Company took its proof of title in the District Court. (Printed Rec., 1426-1454.) And on May 6, 1914, the District Court entered its decree finding complainant's ownership of said reissued Letters Patent No. 11,536, the validity and infringement thereof and directing an accounting. (Printed Rec., 1454, 1455.) No injunction was granted, since the patent had expired. The Toledo Company took no appeal from this decree.

The cause went before the Master upon the accounting. The accounting lasted through 1915, 1916, 1917 and until May 6, 1918, when the Master's report (Printed Rec., 2765-2793) was filed in the District Court. During the accounting the Toledo Scale Company in 1917 took the depositions of the witnesses in regard to this newly discovered Phinney commercial use evidence (Printed Rec., 2549-2683), as it was set forth in the 1913 affidavits. During the taking of that testimony in regard to the Phinney scales the Superintendent of the Toledo Company's factory, who had made

a careful examination of the three Phinney scales and drum produced in 1913 to the Court of Appeals (Printed Rec., 2650), now marked as Providence Exhibits 1, 2, 3 and 4, testified that he did not take any test weights and test those Phinney scales as to their weighing because he did not think they would weigh properly. They would indicate, he said, some weight but wouldn't indicate a correct weight. (Printed Rec., 2670.)

Upon the Master's report (Printed Rec., 2765) and exceptions thereto the Illinois District Court on March 5, 1919, entered its final decree (Printed Rec., 2860), overruling the exceptions of both parties, confirming the interlocutory decree of May 6, 1914, and making it the final decree as to the matters therein decreed, and decreeing in favor of The Computing Scale Company and against the Toledo Scale Company the amount found by the Master for profits of the infringement, $404,101.97, with interest from the date of filing of the report, in all amounting to $420,883.44.

Thereupon an appeal was taken to the Seventh Circuit Court of Appeals by the Toledo Company, and a cross appeal of The Computing Scale Company was made, the latter claiming that the Toledo Company should be required to account for the established business of infringing scales of which it was in possession at the expiration on September 3, 1912, of the patent infringed, and for the profits of 1,839 infringing scales then on hand that it had afterwards sold, as well as other items of advantage from infringement. (Printed Rec., 2846-2853.)

This appeal and cross appeal finally came on for argument February 4, 1921 (Printed Rec., red paging, 3264), and upon said hearing the Toledo Scale Company made another application by a bill of review based upon the affidavits filed in 1913 in the record and the depositions

in the record taken in 1917 as to the alleged newly discovered evidence, containing as exhibits the three Phinney scales and drum, theretofore in 1913 presented to the said Court of Appeals.

The Toledo Company contended that such evidence showed that The Computing Scale Company had full knowledge of the Phinney scales throughout the present litigation and that the defendant had no knowledge of those matters and that to refuse to consider the evidence in the record respecting the Phinney scales as affecting the validity of the patent in suit would be to permit the plaintiff "to take advantage of its concealment of essential facts known to it and unknown to the defendant or the court, and its consequent imposition on both." (Printed Rec., 133, 134.) Thereafter the Court of Appeals, Judges Baker, Alschuler and Evans (Printed Rec., 3266) rendered an opinion (279 Fed. 648), wherein it treated the defendant's application on the affidavits of 1913 and the proofs offered to the Master in 1917 and embodied in the record concerning Phinney's commercial practice as an application to reopen the case for review and to reverse the preceding decree of the Court of Appeals upholding the validity of the patent and the District Court decrees of 1914 of validity and of 1919 of accounting on final decree. (Printed Rec., red paging, 3303.)

The court denied such application, found the Master's report to be correct and affirmed the final decree. (Printed Rec., red paging, 3303-3310.)

Thereupon the mandate was stayed to allow a petition for a writ of certiorari to this court. That petition was filed and set forth as error of the Circuit Court of Appeals, the denial of the said bill of review by the Circuit Court of Appeals because the affidavits and depositions

showed that plaintiff had had full knowledge of the Phinney scales for more than ten years, that evidence and numerous samples of them had been introduced in the suit which plaintiff had brought at Philadelphia ten years earlier upon the reissued patent here in suit, and that plaintiff had suppressed and concealed facts within its knowledge and evidence and exhibits of scales from the court and defendant throughout the litigation before the District Court and Court of Appeals. (Printed Rec., 488, and former petition for certiorari and brief of Toledo Scale Company filed herein January 3, 1922, pages 10, 11, 19, 32 and 58.)

This petition for certiorari was denied as above stated on January 9, 1922, but did not end the litigation. A new set of attorneys at Toledo had ready for filing on that day the bill of complaint in the Ohio District Court to enjoin the enforcement of the decree rendered after twelve years litigation. That bill of complaint (Printed Rec., 13) was brought by Toledo Scale Company, a New Jersey corporation, against The Computing Scale Company, an Ohio corporation, and a citizen and resident of the Southern Federal Judicial District thereof, the Fidelity and Deposit Company of Maryland, a citizen and resident of Maryland (Printed Rec., 13), and by amendment (Printed Rec., 33) the United States Fidelity and Guaranty Company, a citizen and resident of Maryland, both being sureties on the supersedeas bonds and certain Ohio banks, some of them residents of the Northern District of Ohio. (Printed Rec., 13.)

This bill, in condensed form, duplications in the bill and inferences being avoided, alleged a conspiracy by The Computing Scale Company to monopolize the manufacture of computing scales since prior to 1901 with Moneyweight Scale Company in order to ruin plaintiff and drive it out of business; and in pursuance thereof, from

1902 and several years thereafter The Computing Company manufactured a dishonest scale and caused and permitted said Moneyweight Scale Company to advertise the dishonest character of such scale; and when Toledo Company exposed such sale The Computing Company's malicious hatred was increased and it applied for an injunction which was refused; and from 1902 to 1905 The Computing Company advertised that Toledo Company's fan scale was an imitation of defendant's scale and brought a number of suits in 1905 against plaintiff but afterwards dismissed the same. That in 1906 the Toledo Company began to make a drum scale, and The Computing Company in 1907 and 1910 instituted suits for infringement of its patent, well knowing such suits to be based upon fraudulent claims, and that said patents were invalid. (Printed Rec., 14, 15.) [The record showed that the Toledo Company obtained the dismissal of the Ohio infringement suits as a condition to an extension of time to take evidence to The Computing Company. (Printed Rec., red paging, 1158.)]

Then the bringing of suits in Ohio in 1907 and the alleged facts as to the Philadelphia litigation in 1901 are alleged as in the affidavits of 1913, and charging, as said affidavits did, the suppression of the evidence and scale exhibits at Philadelphia.

It is further alleged in the bill that in 1906 after Toledo Company engaged in the manufacture of a drum scale, The Computing Company advertised that said scale was an infringement of its patents and shortly thereafter filed suits for infringement in the Ohio District Court, and thereupon The Computing Company secretly engaged in an effort to find all of the Phinney scales which had been manufactured and which were not in its factories, and did locate and secrete substantially all of said Phinney scales, except one or two which were in the hands of users thereof, for the purpose of destroy-

ing or secreting such scales and thus suppressing and keeping them from the plaintiff or the court and it did not press its Ohio suits but after obtaining and secreting or destroying substantially all the scales manufactured under the Phinney patent it brought its suit in the Illinois District Court in 1910 for infringement and alleged that Smith was the inventor of the Smith patented scale, which statement in the pleading was false as The Computing Scale Company and Ozias, its vice president, well knew. Then is alleged the record in the Illinois suit including the allegation of the Toledo Company's answer setting forth the defense of the Phinney patent as an anticipation, but omitting the defense of prior use of the invention by Phinney scales and alleging the giving of false evidence therein by some of the witnesses as to there being no existing computing scales (Printed Rec., 15-20), but the good faith of the others, so testifying, the diligence of the Toledo Company as to the new evidence in 1913 and its failure to learn thereof at the time of trial. That it knew of the Phinney patent, but by reason of the fraudulent activities of The Computing Company, was not able to and did not learn of the manufacture or use or existence of any scales made by Phinney under the Phinney patent, and no information was given to the Toledo Company by anyone connected with The Computing Company or by Philadelphia counsel concerning the evidence and exhibits in the suits at Philadelphia and plaintiff did not know thereof, and that by reason of the conduct of The Computing Company the Toledo Company did not obtain knowledge or information of the facts with respect to the manufacture and use of the Phinney scales until after the decree in the Illinois District Court of 1912 had been entered sustaining the validity of said infringed patent.

That the Toledo Company prosecuted an appeal from

such decree of 1912 and the Circuit Court of Appeals filed an opinion sustaining the decree finding validity of the patent in 1913, but that during the pendency of the plaintiff's appeal in the Seventh Circuit Court of Appeals Toledo Company obtained knowledge of the manufacture and sale of Phinney scales and then made a diligent investigation and procured a large number of affidavits concerning such use, and thereupon moved the Circuit Court of Appeals for leave to dismiss its appeal as to the reissued patent in order that the District Court might entertain an application to reopen the case thereon, which motion was denied by said Circuit Court of Appeals, and when the said Circuit Court of Appeals had handed down its opinion in 1913 the Toledo Company filed its motion supported by affidavits for leave to introduce in the District Court proofs respecting the manufacture and sale of Phinney scales, and the Circuit Court of Appeals denied such motion.

That thereafter a new decree was entered by the District Court and an accounting had before the Master resulting in a finding of profits by the Master and in said proceedings before said Master the Toledo Company offered evidence of the prior manufacture, sale and use of said Phinney scales and the Master declined to consider such evidence either as bearing upon the validity of the patent or as affecting the amount recoverable for infringement, and the District Court affirmed the Master's report, and the Circuit Court of Appeals, on appeal from the final decree, upon the point of the Phinney commercial use evidence refused to reopen the case or set aside the prior decree or the final decree. That the Toledo Company first heard of the buying up of Phinney scales and secreting thereof on December 20, 1921.

That after the decision of the Circuit Court of Appeals the Toledo Company applied to the Supreme Court for a writ of certiorari which was denied.

That after the entry of the final decree in the Illinois District Court the Toledo Company gave its supersedeas bond with the Fidelity and Deposit Company of Maryland as surety, and after the second opinion of the Circuit Court of Appeals gave its additional supersedeas bond with the Fidelity and Deposit Company of Maryland as surety. By amendment (Printed Rec., 33) the United States Fidelity and Guaranty Company was made a party as additional surety. The bill alleged that Toledo Company, in order to secure the surety companies, drew its checks upon certain Ohio banks, payable to the order of said Fidelity and Deposit Company which checks were certified and said Fidelity and Deposit Company cashed said checks and deposited the money to its account in the Ohio banks on which the checks were drawn and received unconditional certificates of deposit for the moneys, and by amendment (Printed Rec., 38) it was alleged that the Toledo Company at the time of borrowing the money to meet the certified checks upon the Ohio banks and being then indebted to various banks in the sum of $395,000, evidenced by promissory notes, gave additional promissory notes to such banks in the sum of $450,000, and to secure all of said notes deposited various collateral consisting of bills receivable, various stocks and bonds, and since said time has renewed said promissory notes. (Printed Rec., 28-30.)

The Toledo Company prayed a temporary restraining order without notice, a preliminary injunction after notice, and upon final hearing a perpetual injunction against The Computing Scale Company's enforcing or

attempting to enforce said decree in said Illinois District Court and any decree of the United States Circuit Court of Appeals upon appeal in said cause, and against enforcing or attempting to enforce against the sureties on the supersedeas bonds the said decree, and from seeking or claiming any advantage or benefit because of each or all of the judgments, orders or decrees in said suit or in any appeal thereof, and that the Toledo Company might be relieved from all liability upon said supersedeas bonds and that it be held that the said supersedeas bonds were obtained fraudulently and that the same be canceled and that the surety companies ordered and directed to turn over to plaintiff all moneys held by them as security against liability on said bonds, and that the Ohio banks be enjoined from paying the certificates of deposit. (Printed Rec., 31, 32.)

In support of the bill the Toledo Company filed the resworn affidavits filed in 1913, which affidavits are as above stated.

By an actual analysis of the affidavits filed in support of the bill and as they were filed in 1913, excepting Smith, it appears from Phinney that not more than twenty Phinney scales were ever put together. (Printed Rec., 61.) They were disposed of as follows: Two were loaned to Howson and Howson and became Providence Exhibits 1 and 2 (Printed Rec., 2553, 2556); one scale was sold to Raymond and returned by him for another scale (Printed Rec., 164), (here are two scales); one scale went to Devlin and had not been used for twenty years (Printed Rec., 2600); one scale was acquired by Phinney from Tierney (Printed Rec., 62); one scale was used in Phinney's home. This became Providence Exhibit 3 (Printed Rec., 2558); one scale was sent to England in 1873 and was never heard of again (Printed Rec., 61,

164); two scales were purchased by Landers, Frary and Clark and were destroyed by them (Printed Rec., 182); two scales were in the hands of Smith (Printed Rec., 157); three scales, says Phinney, were sold to a representative of the Dayton Company (Printed Rec., 62); Gillan sold one scale for the Philadelphia litigation, probably to Howson (Printed Rec., 172). Here are sixteen of the total twenty scales accounted for and Phinney says that he sold three scales to some one who represented the Boston Computing Scale Company, the predecessor of The Computing Scale Company. (Printed Rec., 166.) This makes nineteen scales out of a maximum of twenty that could not have been bought up and secreted by The Computing Company after 1906, as is charged. This shows an extensive and accurate search by the Toledo Company in 1913 and the tracing of practically every Phinney scale that was ever made, *showing the full disposition of them at a time prior to* 1906, *when the Toledo Company began its infringement.* It was plain that except as stated none of these Phinney scales could be traced to The Computing Scale Company.

The Computing Company filed its answer, under Rules 29 and 30, including all its defenses, in which, appearing specially for the purpose of making its objections to the jurisdiction of the court (Printed Rec., 126), it pleaded, (a) no jurisdiction of the person of the defendant, The Computing Scale Company, because it was not subject to be sued in the Northern District of Ohio, and the surety companies were not subject to be sued in the Northern District of Ohio and the Ohio banks were neither necessary nor proper parties defendant and collusively made defendants, and (b) that the jurisdiction over the subject matter belonged to the Circuit Court of Appeals for the Seventh Circuit and the District Court for the Northern District of Illinois, Eastern Division,

and that no jurisdiction existed in favor of the Ohio District Court to enjoin the enforcement of the decree of another United States District Court because the Illinois courts could grant full relief. (2) The Computing Company not waiving its special appearance excepted to certain portions of the bill, namely, those charging a conspiracy to monopolize. (3) The Computing Company, not waiving its special appearance and its exceptions pleaded a demurrer in equity to the bill. (4) The Computing Scale Company not waiving its special appearance and its exceptions and its demurrer, pleaded that the Toledo Company had been guilty of such laches as to disentitle it to any relief. (5) The Computing Scale Company, not waiving its special appearance, its objections to jurisdiction and its exceptions and its demurrer and the defenses of laches, pleaded a plea of prior adjudication, setting forth all the proceedings upon the subject of such newly discovered evidence as to Phinney scales in the Illinois District Court and in the Seventh Circuit Court of Appeals. (Printed Rec., 128-136.) (6) The Computing Scale Company also answered, not waiving any of the preceding objections and plea and denied all the allegations of the bill as to conspiracy to monopolize and as to suppression of evidence and all conspiracy and fraud. (Printed Rec., 136-143.)

As exhibits to its answer The Computing Scale Company set forth the first decision of the Circuit Court of Appeals finding validity. (Printed Rec., 144-149.) It next set forth *in parallel columns* (Printed Rec., 150-183) the affidavits filed in the Circuit Court of Appeals on May 14, 1913, and the affidavits now filed in support of the bill in the District Court of Ohio, showing that they were the same. It next set forth the decision of the Circuit Court of Appeals on final affirmance of the de-

cree overruling the third bill of review in that court. The Computing Company also showed the parts of the record in the Seventh Circuit Court of Appeals, showing the motions, affidavits, depositions and the various decrees.

The Computing Company also filed affidavits of its officers and employees and of its patent counsel showing no buying up of scales (Printed Rec., 44-60), and showing the existing past correspondence as to the suits (Printed Rec., 56-60); other correspondence appeared in the record (Printed Rec., 90, 91) made by certain patent attorneys; that Ozias, whose statements sworn to, were charged to show buying up Phinney scales had been dead since 1911, and James also charged had been dead since 1907. These charges were in the affidavit of one Koehne filed by the Toledo Company with its bill (Printed Rec., 44, 47-60), and his bad character and the lack of truth in his statements was shown by an affidavit of Judge Oren Brown of Dayton. (Printed Rec., red paging, 438.)

Substantially all that was new over 1913 in the bill in Ohio was a charge that *almost all*, instead of *some* Phinney scales, had been bought up and all that was new in the affidavits filed in support of the bill in the Ohio District Court was the affidavit of Koehne. (Printed Rec., 378, 387.) This affidavit consists of statements of bald conclusions and none of its statements seems to be evidence. It is practically all recital of incompetent statements of a man deceased since 1911 or statements of what some one knew or thought.

Upon the record before him the Judge of the Ohio District Court found, (1) that the proof before him tended to show that the decree in the Illinois District Court of March 5, 1919, was obtained by fraud and that diligence was shown by the Toledo Company. (2) That

the Computing Scale Company had appeared and contested the merits of the question raised by the bill of complaint and the motion for a preliminary injunction and had submitted its person and the said controversy to the jurisdiction of the Ohio District Court. (3) That to preserve the rights of the parties a temporary injunction should be issued against The Computing Scale Company from enforcing the decree and the supersedeas bonds, as well as an injunction against the other parties. (Printed Rec., red paging, 443-445.) This injunction was to issue upon the giving of a $15,000 bond.

In its opinion (Printed Rec., red paging, 445), which we condense, the Court passed upon the question of *res judicata* and of jurisdiction. It held that the bill was one for fraud, that the United States District Courts were as to such matters foreign to each other, that the fact that the Circuit Court of Appeals for the Seventh Circuit still had control of the decree was immaterial, that the relief sought in the Ohio Court could not have been had in the Circuit Court of Appeals for the Seventh Circuit, and that the District Court for the Northern District of Illinois was not such an equally appropriate forum as the Ohio Court, that upon the trial of the infringement case in 1911 in the District Court of Illinois the Toledo Company had not offered any evidence to support its allegation "of prior public use and sale of the Phinney patent, relying alone upon the disclosure of the patent itself as sufficient to anticipate the Smith grant," but that pending appeal it had made an investigation thereof and embodied the result in certain affidavits used in 1913 on which it founded a motion in the Circuit Court of Appeals for leave to introduce in the District Court the alleged newly discovered evidence, and *as exhibits to those affidavits offered three Phinney scales.*

The Court said that the Circuit Court of Appeals had overruled such application because the Circuit Court of Appeals found the Toledo Company had been not only wanting in diligence but had not presented by the affidavits a *prima facie* case making a defense of prior use, but the Court suggested, citing authorities, that in view of the public interest the Circuit Court of Appeals would not have ignored evidence against a monopolistic claim merely because it had not been diligently sought by the party who in a quasi capacity, at least, represented the public. [The Court here lost sight of the fact that the patent sued on for infringement had expired on September 3, 1912, and when the application for review was made to the Circuit Court of Appeals there was no public interest involved because the invention of the patent had become the property of the public.] The Court further said, after stating that the affidavits of 1913 did not make out a case of fraud: "Some rhetoric, of course, was used to the effect that the concealment was sinister and fraudulent, but justification of this language, occurring in the several applications and briefs of the plaintiff here in all the courts, including the petition for writ of certiorari in the Supreme Court, is referable to the character of the facts themselves as shown by the affidavits." (Printed Rec., red paging, 456.) The Court then said that there was no obligation upon The Computing Scale Company then to disclose any knowledge which it had of Phinney scales because a defense of prior use was not disclosed by the affidavits.

The Court further held that the Circuit Court of Appeals of the Seventh Circuit had made "no pretense anywhere along the line" of deciding the question whether the defendant here was guilty of actively fraudulent concealment of known facts vitally affecting the

issues of its litigation. "Nor does it appear that the issue of fraudulent concealment was, *as now made*, ever brought to the attention of any other agency for the determination of the merits of the litigation."

The court then quoted the words of the Circuit Court of Appeals of the Seventh Circuit in ruling upon the bill of review in its final affirmance in 1921 and said that there is nothing to indicate that the court decided the merits of a charge that its decree of 1913 was assisted by a fraudulent concealment (Printed Rec., red paging, 458) and that the strength of the charge made in its petition for certiorari to the Supreme Court, which is quoted, "assuming that, superficially, it is broad enough in its wording to raise the same issue as attempted here," "is ponderable by the use of the 1913 affidavits themselves and nothing else" and that such charge did not invite the Supreme Court to consider anything more than indicated in the Court's comments. [Here the court lost sight of the fact that in 1917 depositions were taken and incorporated into the record.] In the case before it, the Court said, the plaintiff not only charged the defendant with concealing from the court the discovered facts but goes further and alleges that the Dayton Company "actively and affirmatively suppressed, by acquisition and concealment, evidence inimical to its contention, which was of a character so important that for its cumulative effect, if for no other, equity and good conscience required that it should have gone before the court." (Printed Rec., red paging, 460.) [Here the court lost sight of the fact that in the affidavits of 1913 the Dayton Company was charged as a fact with buying up and concealing, and of having hidden away in its factory at Dayton at least four specimens of the Phinney scales and of suppressing the depositions and Phinney scale exhibits at Philadelphia. (See

affidavit of 1913 of Bert W. King (Printed Rec., 179), affidavit of Evans (Printed Rec., 160), affidavit of Sherwood (Printed Rec., 158), affidavit of Thomas Z. Phinney (Printed Rec., 165, 166), and petition for review in 1913 (Printed Rec., 183).]

The court further holds that cumulative evidence on the question of prior use in patent litigation, because of the monopolistic character of a patent right, is to be highly regarded and sought for, and that the difference between the former charge and the present charge is the difference between a passive attitude toward certain facts and a deliberate and fraudulent purpose for getting prejudicial testimony out of the way. (Printed Rec., red paging, 460.) The court finally adds, as its summing up (Printed Rec., red paging, 463):

> "The facts set up in these affidavits do not constitute a matter of newly discovered evidence merely. To be sure, had they been before the courts in the Seventh Circuit, and accepted by those courts, they would have had an important bearing upon the result. But newly discovered evidence which should be brought to the attention of the court in a patent case by way of bill of review is evidence upon one of the issues of the case. Here the plaintiff by its affidavits is not merely offering additional evidence of anticipation, which, of course, is the fact, but it is offering evidence explaining why it could not have still further offered additional evidence in the first court, alleging that its default was because of the active fraud of the defendant, in putting such evidence beyond the reach of the plaintiff or anyone else." (Printed Rec., red paging, 463, 464.)

[This seems to show that the Court was reviewing the Court of Appeals' holdings against the bills of review on the subject of diligence.]

The Ohio District Court added a memorandum to its opinion regarding the application of The Computing

Scale Company by ancillary bill to the Seventh Circuit Court of Appeals, and a further ruling that The Computing Scale Company by its answer reserving its special appearance had made up an effective entrance of appearance of the defendant for all the purposes of the case. (Printed Rec., red paging, 464-471.)

In the opinion of the Circuit Court of Appeals for the Seventh Circuit upon the ancillary bill, Judges Baker, Mack and Evans (281 Fed. 488), the Court, after noticing the issues in the litigation and the prior rulings of the court upon the newly discovered evidence as to the commercial use of Phinney scales, and after stating the allegations of the bill in the Ohio District Court, and after explaining why the question could not be certified to this, the Supreme Court (281 Fed. pp. 489-492), holds that (1) if the material issues tendered in the Ohio record were within the exclusive jurisdiction of the Circuit Court of Appeals, the Computing Scale Company should prevail, and (2) that if the Ohio record discloses only a bill of review, or a petition in the nature of a bill of review, or a petition for rehearing, then this is the only court to consider the question. (3) The Court then cites *Kessler* v. *Eldred*, 206 U. S. 285, and *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U. S. 356, to show that The Computing Company, if the question had been adjudicated, could apply to the Seventh Circuit Court of Appeals upon ancillary bill. The opinion then shows that the counsel for the Toledo Company were contending before the Circuit Court of Appeals that the Ohio District Court was called upon in the litigation to set aside the adjudication of the validity of the patent and to proceed to find the patent void and to substitute its judgment of the nonvalidity of the patent in order to get rid of the accounting decree (281 Fed. 490-494) and explains

why the bill in Ohio was after all a bill to reverse the rulings upon the newly discovered evidence.

The Court next holds that only extrinsic fraud furnishes an independent ground for attacking the final decree, which must be extrinsic to the issues already tried and indicates examples of extrinsic fraud and intrinsic fraud, and then analyzes the allegations of alleged fraud in the bill in the Ohio District Court and shows that it charges concealment of evidence upon issues decided in the litigation in Illinois. [The Court could have stated that the alleged suppression of evidence according to affidavits filed took place before the Toledo Company began its infringement of the patent in suit.] The Court finds that there were no representations of The Computing Scale Company to the Toledo Company, no deception or misleading of the Toledo Company, and between those parties there was only contact in open court. It is held that the bill at Toledo charges no extrinsic fraud. The Court also shows that the alleged fraudulent conduct was not either extrinsic fraud nor any cause of Toledo Company's failure to introduce at the trial evidence of prior sale and use by Phinney at Pawtucket, that The Computing Scale Company never maneuvered the Toledo Scale Company into staying away from Pawtucket, nor procured any witnesses or users of Phinney scales to conceal or deny their existence or tried to keep the evidence of any witnesses from being heard, or any witnesses to withhold their knowledge or solicited any suppression of the records, and that the alleged discovery of December 20, 1921, did not affect the situation; that the Toledo Company had abundant examples of Phinney scales prior to 1913 and during the six years prior to the trial in June, 1912, any investigation at Pawtucket would have brought forth more Phinney

scales and that as soon as it inquired it found the alleged evidence. (281 Fed. 495-497.)

The Court then examines the record and decides that the claim of suppression and concealment has been adjudicated and says that the trial court's decree of validity and the Court of Appeals' affirmance thereof was not final but was a quasi definitive decision which, if nothing occurred to prevent, would in due course be carried into the final decree, citing *Simmons Co.* v. *Grier Bros. Co.* 258 U. S. 82, and that nothing to prevent such effect in the way of newly discovered evidence could be originated in the trial court, and that a motion or petition in the nature of a bill of review presented to the Court of Appeals was necessary to bring in newly discovered evidence and that the decree of validity would become final unless opened by the Court of Appeals, and the action of the court in dismissing the proposed bill of review in 1913 because it showed want of equity on its face was final in the same sense, citing *Embry* v. *Palmer*, 107 U. S. 3, yet that the Toledo Company without calling the Court of Appeals' attention at any time between 1913 and 1921 to any injustice in the trial of the issue of validity, put into the accounting record in 1921 the depositions and the same exhibits that had been presented in 1913, and in the record on appeal from the final accounting decree again presented a bill of review on account of the newly discovered evidence and the Court held that the petition in the nature of a bill of review was bad on its face and again dismissed it for want of equity. The Court shows that the issue of fraudulent concealment was made in 1913 and 1921, and cites one instance of the charge of fraudulent suppression as contained in the affidavit of Thomas Phinney (Printed Rec., 487, 488), as typical of the contention in 1913 and 1921. The Court shows that before the Court of Appeals in the hearing on final

decree, fraudulent conduct was asserted as it was in the petition for certiorari to the Supreme Court of the United States, and that while the Toledo Company's former counsel were urging on the Supreme Court, as a sufficient excuse for lack of reasonable diligence in discovering the new evidence back in 1913, the alleged fraudulent conduct of The Computing Scale Company in purchasing, concealing and suppressing some of the Phinney scales, the Toledo Company's present counsel were engaged in preparing the Ohio bill and having it ready to file the moment the contentions of the former counsel were denied. The Court then holds that summary judgment may be entered against the sureties and formulates its mandate to the lower court. (Printed Rec., 488.)

All the facts that can possibly come in question on this certiorari have been stated except perhaps we should allude to the alleged dishonest character of The Computing Scale Company's scales. It would seem that one who has appropriated a patent and built and sold many scales under it is hardly in position to allege the dishonest character of the scale, but the fact is that this contention refers only to the chart in the scale, as we now show.

Charts in computing scales are constructed upon two principles. One principle is to put opposite the pound and ounce indications of weight the calculated values of those pounds and ounces at the different prices per pound shown on the scale, and in weighing, the scale shows when a commodity is placed on the scale the calculated value of the weight at different prices per pound. These calculations are made on the business usage that when in the calculation a fraction of a cent results, if the fraction is less than one-half of a cent it is disregarded, but if it is one-half cent or more it is called a

whole cent. Thus for five and one-fourth pounds of a commodity at eleven cents a pound the scale would show for the calculated value of fifty-seven and three-fourths cents, the figure of fifty-eight cents. It is charged that this scale is dishonest to the purchaser because it indicates fifty-eight cents as such calculated value for five and one-fourth pounds at eleven cents a pound. If the weight had been five and one-eighth pounds the calculated value would have been fifty-six and three-eighths cents and would have appeared on the scale as fifty-six cents and on that account the scale is said to be dishonest toward the dealer. The calculated figures were admitted to be correct under the commercial rule.

The other principle upon which charts of computing scales are constructed is to divide the space of the pound graduate into as many parts as there are whole cents in the price per pound, thus at eleven cents per pound the space of a pound is divided into eleven parts, each part corresponding to one cent in the price and to one-eleventh of a pound, although one-eleventh of a pound is a weight unknown in the avoirdupois scale. In weighing with such a chart fractions of a cent would be indicated by the fact that the indicator on the scale would stop between the marks for cents and the dealer would dispose of the fraction of a cent by means of his eye, and this latter is said to be the only honest chart that can be put into a computing scale.

The whole matter seems to be immaterial, for whether the scale disposes of fractions of a cent according to the commercial rule or whether the dealer disposes of fractions of a cent by his eye according to the commercial rule, seems to be a matter of no importance as to substantial accuracy. The scales were admitted to be correct weighing machines. The whole contention is

based upon the legal proposition that a dealer must sell fractions of a pound at the exact arithmetical proportion to the price of a whole pound that such fraction of a pound bears to the whole pound, but how a dealer is to deliver a fraction of a cent is not disclosed by this contention.

Now it is apparent that with either kind of a chart or with an ordinary pound and ounce scale without a chart if a dealer should buy a piece of ten pounds of pork chops at eleven cents a pound and sell the piece out again at eleven cents a pound he would gain nine per cent, if he could by any human possibility cut the piece into twenty half-pound pieces and sell each half pound at six cents, as he must. He would gain ten cents, a half cent on each half pound, or a gain of nine per cent. But this results from the fact that there is no recognized transaction of a half cent.

It was on this claim that the Toledo Company from 1902 to 1906 savagely denounced the patented drum scale as dishonest, carried on a complete advertising propaganda against it, caused sealers of scales to condemn the scale, caused numerous suits over the scale, until at last in October, 1906, it began to build and sell drum scales in violation of the patent. The Master's Report shows the preliminary facts to some extent. (Printed Rec., 2776.)

That in the litigation in the Ohio District Court the surety companies were acting in collusion with the Toledo Company to support the jurisdiction is shown in our brief in Case No. 388.

BRIEF OF ARGUMENT.

General Statement of Issues.

When on either May 14, 1913, or October 4, 1921, a bill of review of the decree finding validity of the reissued patent No. 11,536 was presented to the Seventh Circuit Court of Appeals upon alleged newly discovered evidence of the manufacture and sale of Phinney scales, that the court was presented with an issue made up of the following circumstances:

1. In the pleadings in the case the issue of prior use and sale of such Phinney scales as embodying the invention of patent in suit at Pawtucket, Rhode Island, had been pleaded by the Toledo Company, and the reissued patent showed that drum scales had been made but would not weigh correctly.

2. There was evidence in the record to the effect that the Toledo Company after full warning had voluntarily not sought evidence upon that issue though the same was accessible and though the Toledo Company was fully informed as to the Phinney patent and the presumption was that some scale or scales had been made under it.

3. There was evidence in the record from witnesses both of The Computing Company and the Toledo Company (a) that a scale made after the Phinney patent would not weigh correctly, (b) that whatever those scales had been they had not been commercially successful; they were not on the market nor on sale nor in use when the reissued patent was taken out.

4. The reissued patent as soon as it was taken out has become a great commercial success, and has gone into e

tensive use and was for a long time the only computing scale.

5. The District Court on such evidence had decreed the validity of the reissued patent and necessarily had adjudicated that the issue made by the Toledo Company of the two years' prior use of the invention by Phinney in the Phinney scales was either not proven or disproven by the evidence.

6. Upon appeal the said Court of Appeals on April 15, 1913, had affirmed that decree and had on the record decreed the validity of the reissued patent and had necessarily passed adversely on the issue of prior public use and sale of Phinney scales as embodying the invention in patent in suit.

7. On January 21, 1913, in a bill of review, brought to review this finding against Phinney's prior public use and sale, the Toledo Company alleged:

1. That it had recently discovered (a) that the patentee under the 1870 Phinney patent had made about twenty scales, (b) that certain of those scales had been put into use, (c) that it was claimed that certain of them had been used for weighing, but as to whether those scales were accurate weighing machines was not proven by such new evidence, (d) that such evidence was in fact not new, but all the witnesses thereto were easily accessible at Pawtucket at any time after 1895 or 1900, (e) that ample specimens of such scales had been easily accessible, (f) that three of such scales and a drum of a fourth scale were now produced and shown to the Court of Appeals as exhibits to the bill of review, (g) that such scales so produced had been since 1901 exhibits in a litigation at Philadelphia and that inquiry at Pawtucket would have readily disclosed such scales at any time after 1901, (h) that such scales, it was claimed,

in themselves embodied the invention claimed in the reissued patent and were decisive against the validity of that patent and that the finding of no prior use of the invention in patent in suit by Phinney was erroneous.

2. It was alleged that notwithstanding the preceding facts the Toledo Company has not been guilty of any lack of diligence because the Toledo Company charged that it had failed to find Phinney scales not from any lack of inquiry but on account of the conduct of The Computing Scale Company in this, (a) in the litigation at Philadelphia in 1901 the depositions showing the above facts had been kept off the record and suppressed, (b) the exhibits of Phinney scales there in evidence had been taken by stipulation into the hands of The Computing Company's counsel and kept out of sight, (c) three Phinney scales had been bought up by the predecessor Boston Company of The Computing Company, (d) at least four of such Phinney scales had been kept out of sight by The Computing Company in its factory, (e) one Phinney scale had been bought by a representative of The Computing Company, (f) all others of the twenty scales made by Phinney except those above stated were accounted for in other hands than those of The Computing Scale Company and the affidavit of Davis showed that he had investigated the Phinney patent prior to trial. (Printed Rec., 153.)

But the bill of review did not disclose any reason except the above alleged facts for the failure to seek witnesses or scales at Pawtucket.

3. The bills of review alleged as a third ground that all the facts as to the sale and use of Phinney scales were known to The Computing Company prior to and after 1901, but it had knowingly and intentionally concealed

and suppressed such facts, had not informed at any time prior to the trial in 1911 the Toledo Company as to such facts, that it was its duty not to conceal such facts, (which proposition is necessarily founded upon a duty to disclose), that it had actively assisted such concealment by buying up scales, by suppressing depositions at Philadelphia, by getting the Phinney scale exhibits there into its possession, and by buying up and taking into its possession other Phinney scales. This as a legal proposition is plainly an attempt to charge a fraudulent *suppressio veri* by active conduct of suppression, by stating facts alleged to support such a charge.

Upon the above alleged facts the Toledo Company asked a reopening of the decree finding validity and a rehearing upon such new evidence together with the evidence already in the record, in order to review the finding against the defense pleaded of prior use and sale of Phinney scales embodying the invention in the patent sued on, found against the Toledo Company.

The Seventh Circuit Court of Appeals after a hearing on May 14, 1913, dismissed the bill of review for want of equity.

The Toledo Company acquiesced in this ruling until 1917 and in the meantime entered into an accounting. Then in 1917 on the accounting the Toledo Company took in the form of depositions the evidence as to Phinney's commercial practice, called newly discovered in 1913, and existing since 1890. The only new fact put into the record was the evidence that the Phinney scales put in evidence, the same scales that were used as exhibits in 1913, would not weigh correctly, which evidence came from the Toledo Company's practical scale maker.

The Toledo Company with this evidence in the depositions of 1917 and with the affidavits of 1913, and with

the same Phinney scales exhibits, upon the hearing of the appeal from final decree, proffered a new bill of review to the Seventh Circuit Court of Appeals in October, 1921, and made the same contentions for reopening the decree.

This bill of review was dismissed by the Court of Appeals for want of equity and the same grounds for reopening were incorporated into the petition for certiorari to this Court denied on January 9, 1922.

It is certain that any new attempt to set aside the finding of validity of the Reissued patent on account of concealment and suppression of evidence regarding the Phinney scales must meet these prior decrees upon bills of review where that matter has been adjudicated.

The new bill in the Ohio District Court sets forth all the preceding facts except that it does not state the fundamental facts (1) that in its original answer the Toledo Company made the issue of prior use and sale of the invention by Phinney scales, (2) that in 1913 and 1921 in bills of review the Toledo Company alleged facts to show concealment and suppression of evidence on that issue and of Phinney scales, (3) that in 1913 as a part of the new evidence ample examples of Phinney scales had been produced to the Court.

The bill at Toledo adds simply (1) an alleged new fact that The Computing Company suppressed and concealed *almost all* the Phinney scales, (2) an alleged legal inference that the Toledo Company did not in 1913 and in 1921 claim that evidence as to Phinney scales had been fraudulently suppressed, (3) a legal conclusion that the new facts instead of being ground for review go back behind the decrees on the bills of review and are ground for setting aside the Illinois District Court's adjudication of validity and the Court

of Appeals' affirmance thereof, and also the Court of Appeals' decrees dismissing bills of review. This alleged legal conclusion involves the double fallacy, (1) that evidence of suppression and concealment urged as ground for bill of review becomes when the bills of review are denied, evidence to set aside for fraud the very decrees on bills of review, and (2) that evidence of suppression of Phinney scales, urged as ground for reviewing the finding of no prior use by Phinney of the invention sued upon, is evidence to show that finding was induced by the very alleged suppression as a fraud extrinsic to that finding and not inhering in that finding. In other words, new evidence to show that a finding is erroneous is evidence extrinsic that finding, yet it is admitted that before the Ohio Court can set aside the decree of validity of 1913 for fraud it must first get rid of the findings on the bills of review.

Therefore we contend:

1. That the matters in the Ohio District Court bill are *res judicata* by the decrees of the Seventh Circuit Court of Appeals denying review.

2. That the Ohio bill is nothing but a bill of review upon another morsel of claimed suppression evidence.

3. That the Ohio bill urges simply an intrinsic fraud, if it suggests any fraud at all.

We believe that the opinion of the Ohio District Court when analyzed shows the above conclusions to be unavoidable, but first it is necessary to advert to a preliminary question.

I.

THIS REVIEW UPON CERTIORARI IS CONFINED TO THE DECREE OF THE CIRCUIT COURT OF APPEALS ENTERED MARCH 25, 1922.

A large part of petitioner's brief is devoted to an attack upon the decree of the Seventh Circuit Court of Appeals of April 15, 1913, decreeing validity of the patent and upon the decree of October 4, 1921, decreeing affirmance of the final decree upon accounting. This we affirm is entirely irrelevant upon this certiorari. We contend that both the affirmance of the final decree, and the part of that decree, which denied a bill of review has passed beyond the stage of review by certiorari.

The petition for certiorari assigned error in the decree of March 25, 1922, and no more. This Court denied certiorari to the decree of final affirmance of October 4, 1921, on January 9, 1922. That *former* petition for certiorari assigned error in the said final decree, first, on the decree of validity, second, on the accounting, and third on the part of the decree denying the bills of review based on the Phinney scale evidence.

The petitioner relies upon *Hamilton Shoe Co.* v. *Wolf Bros. Co.* 240 U. S. 251, *decided February* 21, 1916, where it was held that a refusal of a certiorari to an interlocutory decree was not a bar to the review of the interlocutory decree upon certiorari allowed to the final decree. This may still be the law, so far as we know, but Section 6 of the Act of September 6, 1916, 39 Stat. L. 727; Fed. Stat. Ann. Supp. of 1918, p. 422, has provided:

> "That no writ of error, appeal or writ of certiorari intended to bring up any cause for review by the Supreme Court shall be allowed or entertained unless duly applied for within three months after

the entry of the judgment or the decree complained of:" (saving six months for the Philippine Islands).

Whether this statute applies to anything more than final judgments and decrees it is not necessary to consider. It certainly applies to final decrees such as the final decree affirming a final decree upon accounting, which ended the case. After three months have elapsed from such final decree of affirmance this Court has no jurisdiction on account of this statute, whether by error or appeal or certiorari. See *Collard* v. *Pittsburgh, etc. R. Co.* 246 U. S. 653, and *Glasgow Nav. Co.* v. *Munson Steamship Line,* 246 U. S. 647.

If by the simple expedient of a certiorari to a decree made after final decree of October 4, 1921, applied for on April 20, 1922, a review can be had of such final decree, the three months' statute is nullified. This Court in practice confines itself to deciding the questions raised by the certiorari. *Westinghouse Co.* v. *Wagner Co.* 225 U. S. 604, *Meccano* v. *Wanamaker,* 253 U. S. 136-142. The claim to review on this present certiorari, the final decree and the ruling upon the bill of review cannot be for any other purpose than to inject here another argument on the Phinney scale affidavits as a sort of make-weight.

But were the statute not in existence the practice of this Court is settled not to disturb decisions of matter of fact confirmed by the District Court and the Circuit Court of Appeals. Here on the questions of fact involved and upon the matter of the newly discovered evidence the petitioner has had the benefit of the judgment of Judge Landis in the District Court and of Judges Baker, Kohlsaat, Wright, Seaman, Carpenter, Evans, Alschuler and Mack at different hearings in the Circuit Court of Appeals.

But were this otherwise the correctness of the finding of the validity of the patent is based upon, among others, a matter of fact which follows many precedents in this Court to the effect that patentability may be inferred where the patent in question shows a success of great commercial value after a long record of failures by others. For a late case see *Diamond Rubber Co.* v. *Consolidated Rubber Tire Co.* 220 U. S. 428, 55 Law Ed. 527.

But were there no statute and no rule of practice, there is an elementary rule that the bringing of a bill to set aside a judgment for fraud waives all errors in the judgment and is pleadable as a release of errors. We have never heard it suggested that the same rule does not apply to a pure bill for fraud to impeach a decree in equity. If this be not a pure bill for fraud, it is admittedly not sustainable.

Again, on the main fact on which the opinion finding validity was based, namely, the finding that other scales claimed to be anticipatory would not weigh correctly, the finding still remains unchallenged. The opinion of the Court of Appeals stated that such former scales had been made and that they had been given bodily form, but found from the evidence that when put into use they did not weigh correctly. We take it that such a scale does not fulfill the sole reason for its existence. Now the last word upon the subject, which was in 1917, comes from the superintendent of the petitioner, a scale maker, who says that the Phinney scales would not weigh correctly. This is what the Court of Appeals held upon the evidence in 1913. A device, the Phinney scale, patented in 1870, which up to 1895 did not become a usable commercial computing scale, while such a scale was being earnestly

sought for, can hardly be considered an anticipation of a scale patented in 1895 which immediately became a great commercial success and out of the infringement of which the petitioner obtained a steady business approximating $700,000 a year, selling each of its infringing scales at $150 or more. But if the Phinney scales themselves are looked at, their utter inadequacy is apparent from an inspection as compared with a scale that registers even a sheet of paper put upon the platform.

Certainly an infringer, who from 1902 to October, 1906, savagely competed against this patented computing scale with a fan computing scale, and who in October, 1906, in desperation, appropriated the patent and at once restored its business and itself achieved a great commercial success in infringing scales, cuts a poor figure when insisting upon the invalidity of the patent at this late day, especially as it, solely by reason of the infringement, and the expiration of the patent, while it was appealing under an order suspending an injunction, was left in possession of this wrongfully established infringing business and of 1839 infringing scales without any accounting therefor.

The Master's Report in this case showing the value of the patent to the infringer, is to a man of practical sense the best demonstration of the patentability of the scale.

As to the various rulings denying bills of review, if these questions were open here, the facts which are set forth in the preceding statement of facts justify the rulings and show that no other rulings could have properly been made. Being largely discretionary, these rulings require a very conclusive showing against them as an original question.

The claim of petitioner that the trespass and infringe-

ment were not willful and intentional is not true. The facts show the exact contrary.

For these reasons we make no reply to that part of the petitioner's brief which seeks to reargue the questions noted above and the Master's findings confirmed by two courts.

II.

THE MATTERS SOUGHT TO BE RELITIGATED IN THE BILL OF COMPLAINT IN THE OHIO DISTRICT COURT WERE RES JUDICATA. THE BILL AT TOLEDO SHOWS UPON ITS FACE THREE PRIOR ADJUDICATIONS.

The opinion of the Circuit Court of Appeals in this case (281 Fed. 488), shows that the claimed fact of buying up of Phinney scales, suppression and concealment thereof, the sole basis of the bill at Toledo, was urged in 1913 and in 1921 as an act committed for suppressing and concealing evidence and misleading Toledo Company. In 1913 and in 1921 able counsel for the Toledo Company considered the fact simply as one excusing what would otherwise be lack of diligence. While Toledo Company's former counsel were urging upon the Supreme Court in a bill of review, as a sufficient excuse for lack of reasonable diligence the alleged fraudulent conduct of The Computing Company in purchasing, concealing and suppressing some of the Phinney scales, Toledo Company's present counsel (now reinforced in this Court by such former counsel) were engaged in preparing the Ohio bill and having it ready to file the moment the contentions of the former counsel were denied. (281 Fed. 499.) In the Ohio bill the circumstances formerly alleged to excuse lack of diligence in finding evidence as to Phinney scales are now urged as a fraud for

setting aside the final decree or enjoining its enforcement.

If we may believe what is claimed, the Toledo Company discovered an additional suppression on December 20, 1921, and did not submit it to its many existing able counsel but set a new lot of Toledo attorneys to work to rig up a new bill and in some way get the case out of the Federal courts in Illinois and caused this new set of attorneys to pronounce that the former opinion of counsel, acted upon in the litigation for many years, and then being acted upon in preparing a petition for certiorari to this Court, filed January 3, 1922, was a mistake and that such facts ought to have been made the basis of a bill for fraud in the procuring of the decree of 1913, and for enjoining the federal decree. The alleged discovery of other Phinney scales suppressed contradicts the showing of former counsel of all Phinney scales traced and accounted for. The Toledo Company is playing out of bounds. The same matters of fact alleged in bills of review are present. The label has been changed. All that the Toledo Company now presents to this Court is an immaterial divergence of judgment between its two sets of counsel, not as to facts but as to legal terms.

This is apparent from the opinion of the Ohio District Court. It holds that suppression and concealment urged in 1913 and in 1921 on the facts alleged were then urged to excuse lack of diligence, with embellishments of "rhetoric" charging fraud, while now they are urged to show "why it (Toledo Company) could not have still further offered additional evidence in the first Court alleging that its default was because of the active fraud of the defendant in putting such evidence beyond the reach of the plaintiff or anyone else." (Printed Rec.,

red paging 464.) Again the Court says that the charge of concealment *as now made* was not before the Court of Appeals. The Circuit Court of Appeals in its opinion demonstrates that in 1913 and 1921 the same issue of fraudulent concealment was presented.

So the courts and the counsel agree that the fact claimed of suppression and concealment of evidence was before the Court of Appeals in 1913 and in 1921.

The claim of suppression and concealment in 1913 and in 1921 was then broader than it is now. Then counsel saw that suppression of scales was useless as a ground, unless suppression of evidence other than scales was charged. So in 1913 and in 1921 the charge was of suppressing depositions of witnesses, along with the getting of Phinney scales, exhibits in a case, into possession, keeping them away from anybody else, and of buying up scales, and of keeping scales hidden away in its factory. Now the charge of fraud is confined solely to concealing scales.

The scales themselves were useless as testimony unless they were supported by the testimony of witnesses. No witness is charged to have been approached or tampered with. It would seem utter folly in The Computing Company to buy up a few Phinney scales while Howson and Howson had ample specimens, and evidence at Pawtucket of many witnesses existed. All the Toledo Scale Company was required to do in 1911 or at any time after it began infringing in 1906 or at the time of the trial, was to go to Pawtucket, Rhode Island, where it had alleged that the scales had been made and sold, and inquire of Phinney's son and find where the Phinney scales were and get the witnesses and the scales and present all the evidence to the Court. We could charge that the record demonstrates that the Toledo Company in

1911 did not want the Phinney scales which are now said to be conclusive, because it was plain then that the moment a Phinney scale should be produced, with "all its imperfections on its head," it would show that the scale was not an anticipation of anything. If the Toledo Company's people had in 1911 looked at the Phinney scales and said: "These things will not do, we shall stick to the patent," their showing of diligence would be precisely the same.

But afterwards they did go to Pawtucket, did find the witnesses and the scales, did investigate what had become of all the Phinney scales, did present the scales and the testimony of all the witnesses to the Court in bills of review.

Not only did they do that but as to the scales going to The Computing Company, while showing that the other scales did not, they charged fraud and concealment in the bills of review.

In the next place, the opinion of the Ohio District Court shows that the affidavits in 1913, carried into the record in 1921, did not make, with the claimed facts of concealment and suppression, any *prima facie* case of either diligence or prior use of the invention by the Phinney scale. But the Phinney scales, *in propriis personis* with all the alleged evidence as to them, were before the Court of Appeals. The Circuit Court of Appeals says that in 1913 and in 1921 it had before it ample specimens of the Phinney scale. At the argument, the Toledo Company properly admitted (281 Fed. 497) that the exhibits, which had been in its possession since sometime prior to May, 1913, bring out the question of materiality of the alleged new evidence on the issue of validity as fully as would additional samples of the same Phinney scales. The Ohio Court says that those scales

were before the Court of Appeals. If this be so, how can concealment of other Phinney scales antecedent to that time cut any figure and become an additional fraud?

The Ohio District Court said that the Phinney scales supported by the affidavits as to their use showed no prior use of the invention and that the affidavits showed no diligence either in the production of the evidence of the witnesses or of such scales. But the Ohio District Court considered that if the Circuit Court of Appeals in 1913 and in 1921 had had before it, in addition to the alleged fact that some scales had been bought up, the additional fact claimed that almost all had been bought up, the Circuit Court of Appeals would have ruled differently on the bills of review in 1913 and in 1921 because cumulative evidence thereon was very valuable.

Plainly, therefore, in the Ohio court's view, the proceeding at Toledo is to set aside the ruling on the bill of review in 1913 and the second ruling on the bill of review in 1921 by means of enjoining the enforcement of the final decree. This is strengthened by the fact that the Toledo Company's counsel claimed (281 Fed. 494) that the Toledo Company was entitled to have the District Court in Ohio decide whether The Computing Scale Company's patent was void in view of the prior art as exhibited, either by affidavits or the depositions taken. If this is not a review of the old evidence in the light of the alleged newly discovered evidence, what can it be? Toledo counsel wish to secure from the Ohio court an adjudication that the patent was void in view of the Phinney practice. So the contention is, in so many words, that the alleged suppression and concealment shall first be used to set aside the decrees upon bills of review and the adjudications of the Circuit Court of Appeals on concealment of evidence must be gotten rid of and the Ohio District Court, having set those rulings

aside, shall enjoin the enforcement of the final decree for fraud.

It is plain, then, that before the decree can be enjoined as not enforcible, the ruling of the Circuit Court of Appeals must be gotten rid of for concealment of evidence. Yet that is the very issue formerly presented to the Court of Appeals and decreed against.

It is, therefore, plain that, however the matter is looked at, the issue of suppression and concealment has been adjudicated. It makes no difference as to what was the ground of adjudication, whether that such fact was immaterial in view of the lack of diligence, or whether the Phinney scale evidence had no effect upon the finding of validity, or whether the Phinney scales themselves showed that they were not an anticipation by prior use. The ruling was a denial of the bill of review for want of equity.

Nor does it make the slightest difference whether the ruling upon the bill of review in 1913 was final as to those grounds of review or not, although it would be singular if a decree dismissing a bill of review for want of equity was not final. See *Ricker* v. *Powell,* 100 U. S. 104; *Nor. Pac. Co.* v. *Slaght,* 205 U. S. 122; *Calaf* v. *Calaf,* 232 U. S. 371, 374. There is the ruling upon the same bill of review urged in 1921. That decree denying a bill of review is a part of the final decree and final affirmance, and no one can contend that that decree both as to the merits of validity and as to the review was not final. That denial of the bill of review was for want of equity.

The cases cited by petitioner to show that a ruling upon a bill of review is not final are *Metcalf* v. *Williams,* 104 U. S. 93, *Denny* v. *Bennett,* 128 U. S. 489, *Oklahoma City* v. *McMaster,* 196 U. S. 529, *Bucki* v. *Atlantic Lum-*

ber Company, 116 Fed. 1, *Merriam Co.* v. *Saalfeld,* 241 U. S. 22, but they have not the remotest bearing upon decrees denying bills of review. They are cases of lack of jurisdiction.

Therefore, we contend that all the features of a *res judicata* are present, the same parties, the same issue, a final adjudication of those facts on their merits by a court having jurisdiction.

All that the Ohio District Court holds on this point is (1) that the charge of fraud was not made in the same form in the Illinois Court, and (2) that the Illinois Court's decision does not show that it was passing on a question of fraudulent concealment. Both matters are immaterial.

It cannot be that the Toledo Company can put the substantial facts forward in 1913 as ground for relief in equity and hold back its contention that the facts showed fraud. Facts determine what an issue is, not the words used to give the facts a name or to make a legal inference. When a party brings forward his facts he must make his whole contention or else he is concluded, as the authorities hold. *Calaf* v. *Calaf,* 232 U. S. 371, 374; *Beloit* v. *Morgan,* 7 Wall. 619; *Stockton* v. *Ford,* 18 How. 418; *U. S. ex rel. Harshman* v. *County Court,* 122 U. S. 306; *Dowell* v. *Applegate,* 152 U. S. 327.

There is a case which upon this matter seems to be precisely in point. It has never been questioned. *Embry* v. *Palmer,* 107 U. S. 3, 17, 19.

The case showed a judgment at law, rendered against defendants, in the Federal Court of the District, and a motion for new trial upon affidavits of new evidence not produced and claim of no lack of diligence, and a denial of the new trial. Then an action was brought on the

judgment in a Connecticut state court, and the defendants in the judgment filed their bill for a perpetual injunction against enforcement of the judgment alleging that "Embry, in suppressing his knowledge" of certain evidence and in procuring the judgment "was guilty of fraud." It appeared that defendant "had full, and as it turned out, undue confidence in the legal defenses pleaded in the law action" but it was alleged that the defendant had been misled by concealment. The perpetual injunction was granted by the Connecticut Court.

This Court held (p. 17) that while the new trial was pending the defendants knew these new facts alleged to have been suppressed and if they did not bring them to the attention of the court it was pure neglect; but they did so and when the facts of new evidence were brought to the attention of the District Court, and that court denied a new trial, this decision was final as to that matter. That decision in that cause was not to be reviewed elsewhere. It showed that "a court of competent jurisdiction has passed upon the very matter sought to be again litigated in the courts of Connecticut." The decree of injunction was, therefore, reversed with orders to dismiss the bill.

In accord is *Telford* v. *Brinkerhoff*, 163 Ill. 439, 443.

But when the facts urged at the adjudication are again put forward with a part of them showing the then issue suppressed, and contrary facts of extent of evidence concealed are now urged, the fact of prior adjudication becomes all the plainer. A conscious effort appears to get rid of the adjudication.

The fact of prior adjudication seems unavoidable.

III.

THE PRIOR ADJUDICATION ENABLED THE COMPUTING SCALE COMPANY TO BRING ITS ANCILLARY BILL AGAINST THE TOLEDO SCALE COMPANY TO HAVE THE TOLEDO COMPANY ENJOINED FROM PROCEEDING IN VIOLATION OF THE ADJUDICATION AND TO HAVE IT ADJUDGED IN CONTEMPT.

The ground of the injunction against relitigating a *res judicata* is inequitable conduct in the one relitigating. It is not a collateral attack upon the proceedings being taken against the *res judicata*. The fact of *res judicata* is determined by the record in the adjudicating court, not by the record in the other court. The conduct of a party in going into another court in violation of the *res judicta* is inequitable, causing vexatious litigation, and the party ought to be enjoined from his inequitable conduct. The jurisdiction of the other court where the party is proceeding is immaterial and is not attacked. The injunction acts upon the party and not upon that other court. It assumes that the other court will take jurisdiction and that the party having the adjudication in his favor will be compelled to plead and prove it and will thus be exposed to useless litigation. This is made plain by *Hart Steel Supply Co.* v. *R. R. Supply Co.* 244 U. S. 294, 299. The petitioner's contention that this is collateral attack upon the other court's jurisdiction betrays no comprehension of the meaning of *Kessler* v. *Eldred*, 206 U. S. 285.

The case of *Kessler* v. *Eldred*, 206 U. S. 285, is a leading case and has settled the law. It is approved in *Hart Steel Co.* v. *R. R. Supply Co.* 244 U. S. 294, 299, where the court made a strong statement as to the "cordial" enforcement by all courts of the fact of former adjudication, citing *Kessler* v. *Eldred* and other cases. The case has been frequently cited since and not departed from, and in the late case of *Supreme Tribe of Ben Hur*

v. *Cauble,* 255 U. S. 356, which was solely on jurisdiction, it is held to justify an ancillary bill for injunction in the court where the cause is pending, based on the personal jurisdiction then existing over a class.

If steps are taken under such circumstances as indicate an attempt by the party to avoid the jurisdiction of the court having jurisdiction of the cause, and his conduct shows a contempt of the authority of that court, by acting in fraud of the jurisdiction of the court (*New Orleans* v. *New York S. S. Co.* 20 Wall. 387, 392), he also may be proceeded against for a contempt. The proper court in which to proceed for the contempt, if the case is pending upon appeal, is the Appellate Court that then has jurisdiction of the cause.

See

Merrimac River Sav. Bank v. *Clay Center,* 219 U. S. 527, 535.

The statute, sec. 262, Judicial Code, which provides that,

> "The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions,"

leaves neither this Supreme Court nor a Circuit Court of Appeals powerless in such a case. But the court has such inherent power.

The fact that an Appellate Court reverts to a lower court certain proceedings, which can there be more commodiously taken, follows many precedents in this Court. They need not be cited, but they are plentiful.

Courts of Appeals have acted upon this view of the law. A court may proceed both by injunction and contempt to protect its jurisdiction.

See

Swift v. *Black Panther Oil Co.* 244 Fed. 20, 29.

This is clearly demonstrated in the opinion of the Court of Appeals in this cause. (281 Fed. 493.)

The injunction and the decree for punishment for contempt were clearly justified on the above grounds.

IV.

THE CIRCUIT COURT OF APPEALS HAD EXCLUSIVE JURISDICTION TO DETERMINE THE BILLS OF REVIEW IN 1913 AND IN 1921.

This point has been so often decided that it is necessary only to cite the latest authority.

Nat. Brake Co. v. *Christensen,* 254 U. S. 425.

V.

IF THE BILL IN THE OHIO DISTRICT COURT CONTAINED MATTERS IN THE NATURE OF A BILL OF REVIEW IT SHOULD HAVE BEEN BROUGHT IN THE SEVENTH CIRCUIT COURT OF APPEALS.

Often the bill of review on newly discovered evidence contains allegations of fraud in the procurement of a decree. Therefore, if the Toledo Company desired by a bill of review to bring forward its grounds for review and allege also matters of fraud for setting aside the decree, the jurisdiction of the Circuit Court of Appeals was ample and exclusive, and if any part of the bill is for review, the whole is for review.

Ricker v. *Powell,* 100 U. S. 104.

Ricker v. *Powell* is approved in *Hopkins* v. *Hebard,* 235 U. S. 287, 291.

It is admitted in the opinion of the Ohio District Court

that the bill in the Ohio District Court is not only to secure a review of the ruling upon the question of diligence, not only to secure an adjudication upon the paramount value of the newly discovered evidence as to Phinney's commercial practice, but also to secure a ruling upon antecedent fraud in the suppression of evidence excusing what would otherwise be lack of diligence.

A bill in the nature of a bill of review on the grounds of fraud and review as well, is a bill requiring application to the court where the cause is pending. *Ricker* v. *Powell*, 100 U. S. 104. (See the grounds of the bill stated in *Ricker* v. *Powell*.)

The counsel for the Toledo Company in arguing the case, as we have shown above, took the same position, that the object of the Ohio bill was to secure, among other things an adjudication upon the newly discovered evidence to the effect that the decree of validity was wrong and that the decree should have been that the patent was invalid. This simply means that the review of that finding was wrongly decided in the Court of Appeals.

VI.

WHEN THE BILL FILED IN THE OHIO DISTRICT COURT IS ANALYZED IT IS CLEARLY FOR REVIEW WITH AN INCIDENTAL FRAUD CHARGE. IT CHARGES FALSE AND FRAUDULENT CLAIMS SUPPORTED AT THE TRIAL BY FALSE TESTIMONY. IT ATTACKS THE DECREES ON THE BILLS OF REVIEW AS DECREES THAT WOULD NOT HAVE BEEN MADE IF THE COURT HAD HAD BEFORE IT THE ADDITIONAL TESTIMONY OF SUPPRESSION WHICH IT NOW CLAIMS.

A bill for fraud in the procurement of the judgment simply enjoins the party from enforcing the judgment.

The parties then return to the law court for another trial. It never goes to the extent of depriving the original court of jurisdiction over the cause of action and withdrawing that cause of action from that court's jurisdiction and giving it to the decreeing court. If it does it is not a bill to set aside for fraud. No case so far as we can discover considers a bill to enjoin a decree for fraud except in the court where the decree was rendered which, of course, has full jurisdiction. Yet, whether we consider the bill in Ohio to be a bill to set aside the rulings upon the bills of review and on that basis to enjoin the enforcement of the decree, or an attempt to substitute the judgment of the Ohio Court on new evidence upon validity of the patent in place of the decision of the court that has decided it, nevertheless the matter involves a re-examination of an issue claimed to have been decided on false evidence and wrongly decided, on account of alleged suppression of evidence. Clearly the exclusive jurisdiction for such re-examination is in the Circuit Court of Appeals of the Seventh Circuit.

If the bill in the Ohio District Court is what it is claimed to be, namely, a bill of review charging fraud it could not be maintained until after the decree had been paid. *Ricker* v. *Powell*, 100 U. S. 104. At any rate if for review with fraud *Ricker* v. *Powell* shows that it would lie only in the court rendering the decree.

The record shows (1) an original issue in the case of Phinney's prior use of the invention, which was decided on evidence and is now claimed to be wrongly decided; (2) a supplementary issue on bill of review charging concealment of evidence inducing the alleged original wrongful finding which supplementary issue is now claimed to have been wrongly decided; (3) a pres-

ent bill, which claims both issues wrongly decided, alleging both the former evidence of concealment and a new fact contrary to the former facts of concealment.

That the bill is one to review the former findings seems to be too plain for argument.

VII.

THE BILL IN OHIO CHARGED INTRINSIC FRAUD IN THE DECREE, NOT EXTRINSIC FRAUD, AND THEREFORE THE BILL WOULD NOT LIE IN THE OHIO COURT, BECAUSE A BILL CHARGING INTRINSIC FRAUD IS MERELY A FORM OF REVIEW.

We do not desire to repeat what is said in the opinion of the Circuit Court of Appeals upon this point. (218 Fed. 493-496.) The reasoning there seems to be sound, as it has been stated in the Statement of Facts above. The English rule is the same. The impeachment even of a judgment for extrinsic fraud must be for matters unembarrassed by the issues tried.

Flower v. *Lloyd*, 6 Ch. Div. 297 (per Lord Justice James).

If fraudulent suppression or concealment has once been charged and if that became an issue or could have been made an issue in the Illinois Federal courts in the litigation the Ohio bill is necessarily one charging intrinsic fraud.

If that issue, urged for any purpose, has once been decided the Ohio bill is one necessarily charging, not extrinsic, but intrinsic fraud, for the matter is *res judicata*.

But we desire in this connection to suggest that the actual attack in the bill in Ohio must be looked at. It is an attack upon the rulings of the Circuit Court of Appeals upon the subject of the bills of review, although

the Ohio District Court says that those rulings were entirely correct, since (1) there was no showing of diligence, (2) there was not even a *prima facie* case made for review upon the facts. Clearly, so far as it is an attack upon the ruling upon validity of the patent, that ruling can only be approached through the denial of the bills of review in order to show its incorrectness, and according to the theory of the Ohio bill must presuppose in the record the newly discovered evidence as to the Phinney prior use rejected by the rulings upon the bills of review.

This being so, the matter to be examined is a re-examination of the admitted ruling on the bills of review that the concealment charged did not excuse the want of diligence shown as to the new evidence. The *ratio decidendi* of the ruling upon the bills of review was probably that no diligence had been shown as to this evidence and that the evidence in itself was of no value. Upon the matter of fact it was urged that diligence had been shown because The Computing Scale Company had suppressed and concealed certain evidence.

But it is demonstrable that if there had been no other bills of review, the bill at Toledo would still be a bill of review. It claims that the finding of no prior use by Phinney of the invention was based upon false evidence. It says that it has now the true evidence which shows the finding to be wrong. This true evidence is not outside the issue tried, it is a part of the issue tried. That evidence was concealed and suppressed. Hence it must be that the fraud was the alleged imposing of false evidence. This is intrinsic fraud. How much truer is it that the fraud alleged is intrinsic, when the very issue of suppression and concealment of that evidence has been once tried in the case.

The bearing and materiality of that suppression and concealment was determined by the Court of Appeals. The bill in Ohio is exactly upon the same issue which says that due diligence was shown because of the suppression and concealment of evidence. It pleads all the evidence formerly pleaded for review. The sole difference is one between buying up some Phinney scales and buying up almost all the Phinney scales. So it is perfectly plain that the fraud alleged is a fraud requiring a re-examination on some additional evidence of the rulings on the bills of review. The same concealment is said to be by the Ohio Court not sufficient in 1913 and 1921 but sufficient now. This is an allegation of intrinsic, not extrinsic, fraud, and under all the authorities such a bill does not lie in the Ohio Court. If a re-examination of the issue is desired it must be had in the court which has passed upon the issue of diligence and concealment.

A bill to impeach a decree for fraud in concealing and suppressing evidence which was discovered and presented to the Court rendering the decree as a ground for setting aside the decree cannot be the same thing as a bill to impeach a decree which shows a successful fraud practiced by which a party was prevented from having a hearing. In the former case the evidence alleged to be suppressed has been heard, in the other case the party never had a hearing. The Toledo counsel say that their client has never had its day in court. This means that if the Court of Appeals decided not to open the case for concealment, their client was deprived of its day in court. In other words, the Court of Appeals was compelled to decide a question of judicial discretion in only one way. If it decided the other way it committed error, because it perpetuated an alleged fraud.

These considerations with those stated in its opinion by the Seventh Circuit Court of Appeals show this to be a case charged of imposing on the court by false evidence like *Embry* v. *Palmer*, 107 U. S. 3, cited above, with a suppression of known evidence.

VIII.

THE BILL IN THE OHIO COURT WAS CLEARLY INSUFFICIENT AS A BILL FOR FRAUD FOR THE REASON THAT SUCH A BILL MUST SET FORTH THE CIRCUMSTANCES OF DISCOVERY OF THE FRAUD AND SHOW WHY IT COULD NOT HAVE BEEN DISCOVERED EARLIER AND SHOW DUE DILIGENCE IN REGARD THERETO.

The plain authority in this Court is *Wood* v. *Carpenter*, 101 U. S. 135, 143.

Others can be cited like it and many from the various Courts of Appeals.

The new allegation in the Ohio bill, according to the claims of the Toledo Company, is that almost all of the scales were bought up and suppressed. The affidavits of 1913 show by Phinney's affidavit that about twenty of the Phinney scales were made somewhere between 1870 and 1890. The affidavits show that nineteen of these scales are accounted for, as we show in the statement of facts above. It was perfectly easy to trace these scales and show how many of them, if any, had been bought up by The Computing Scale Company, and this was more easy in 1913 than it was in 1922. The affidavits themselves show that inquiries had been made as to what had become of those twenty scales and that the destination of those twenty scales had been ascertained. Now if it be true that substantially all of those scales were bought up by The Computing Scale Company, it was easy in

1913 and any time thereafter to prove the fact. Of what avail is it then for the bill to say, without alleging any of the circumstances, that it could not discover the destination of those scales before December 20, 1921, without setting forth any of the circumstances of diligence or any of the circumstances of the discovery of the alleged fraud? As soon as the Toledo Company should try to show diligence it would disclose no diligence whatever, but would disclose that what it said was not true.

The fact is that the Toledo Company's own affidavits filed in 1913, refiled at Toledo in 1922, demonstrate that its charge is not true, and the fact is that its affidavits disclose what became of these twenty scales, and instead of it being true that substantially all of them were bought up by The Computing Scale Company the fact is that all the scales The Computing Scale Company could ever have had in its possession were the scales which it was said to have taken over from the Boston Computing Scale Company when in 1899 it bought the Saugatuck factory and there were two or three, according to the affidavits, and two other scales which Smith had and which might have come to The Computing Company in 1899. All the rest of the scales are accounted for in other hands.

In this connection we advert for a moment to the affidavit of one Koehne. A judge of long service and standing in the State of Ohio, Judge Oren Brown of Dayton, has filed an affidavit that Koehne is unworthy of belief. What Koehne pretends to say is that in the time prior to 1907 at various times Mr. Ozias, who has been dead since 1911, told him that he was buying up these Phinney scales, and that at another time Ozias reported to him that he had bought up substantially all of the Phinney scales. There is no showing that Koehne ever saw a Phinney scale. This evidence,

it is needless to say, is not evidence that should move any court, for Ozias' statements were not made to anyone who was relying upon them, nor could he bind his corporation thereby; but when it is taken into consideration that the other affidavits filed by the Toledo Company show what became of those other Phinney scales and where they went to, and that they never came into the possession of The Computing Scale Company, the attempt to palm off a bill in equity on Koehne's affidavit charging the buying up and suppression and concealment of substantially all of the Phinney scales is a bold and palpable deception. The man who drew the affidavit for Koehne should have been careful first to read over what their old affidavits, filed in 1913, showed as to what became of the only twenty Phinney scales.

Now is it not plain why the counsel who represented the Toledo Company in 1913 and in 1921 did not charge that The Computing Scale Company had bought up and suppressed all or almost all of the Phinney scales? They knew from their own affidavits that it was not true, for they had accounted for them.

Is it not also plain why the bill at Toledo suppresses (1) the original issue in 1910 of Phinney's commercial practice; (2) that as part of the bills of review, the Toledo Company urged buying up and suppression of Phinney scales as evidence; (3) that on the hearing of bills of review, when the issue of suppression and concealment of scales was made in 1913 and in 1921, the Toledo Company had obtained and presented ample examples of Phinney scales to the Court of Appeals upon their bill of review, which were held to be insufficient.

It is apparent that the bill is bad because it alleges no diligence in discovery of the alleged fraud, no circumstances of discovery and the record shows that no such allegation could have been made.

IX.

THE DISTRICT COURT IN OHIO HAD NO JURISDICTION OF THE PERSON OF THE DEFENDANT THEREIN, THE COMPUTING SCALE COMPANY.

In order to obtain some sort of colorable jurisdiction at Toledo the Toledo Company alleged that it had given supersedeas bonds and asked to have those bonds, taken in the District Court of Illinois and in the Circuit Court of Appeals, canceled. It therefore made the two surety companies upon those bonds parties, but since those two surety companies had not the requisite residence to justify the bringing of the case at Toledo it was compelled to go farther and allege that the surety companies had been given security for becoming sureties upon the bonds, that the security given to them was cash in the form of certified checks, which checks had been cashed and the money taken into the possession of the surety companies and by them deposited, as the money of one Surety Company, in certain Ohio banks. The original theory of the bill was that in this way the Ohio banks could be made parties and enjoined from paying over the money deposited by the surety companies in the Ohio banks. But the bill conceding the title of the surety companies to the money showed that the bank had no connection with the supersedeas bonds, and therefore by amendment some further color was attempted.

It was alleged that the Toledo Company was already indebted on promissory notes to the Ohio banks in the sum of $385,000 and that these various Ohio banks had taken additional notes for $450,000 for loans to the Toledo Company against which loans the certified checks were drawn, and that the Toledo Company had deposited securities with a certain Trustee to secure the Ohio

banks for the moneys loaned to the Toledo Company upon the promissory note of $385,000 and of $450,000. It was perfectly plain that the Ohio banks could enforce their lien upon these securities in accordance with the agreement of deposit. The surety companies, of course, were not parties to such agreement, which was solely between the Ohio banks and the Toledo Company.

It is plain from the situation that all the allegations as to the Ohio banks were put in the bill for the sole purpose of giving the Court jurisdiction and that the Ohio banks had nothing to do with the controversy between the Toledo Company and The Computing Scale Company over the alleged fraud in the procuring of a decree and were not proper parties. See *Salem Trust Co.* v. *Manufacturers Co.* 280 Fed. 803, 805. It was also plain that The Computing Company had nothing to do with the cash that the surety companies had acquired from the Toledo Company. Nevertheless, the collusion became apparent. Counsel for the Ohio banks turned out to be counsel for the Toledo Scale Company and on both sides of that controversy. The surety companies hastened to put in an answer confessing the injunction and doing all they could to give the Ohio Court jurisdiction. The whole proceeding was a collusive one, simply to bring The Computing Scale Company to Toledo to litigate in a court that the Toledo Company had chosen.

Under these circumstances The Computing Scale Company, in its answer made under Equity Rules 29 and 30 and under a guarded special appearance for that purpose, not waived but kept good throughout the answer, pleaded the lack of jurisdiction of the Ohio Court over the person of The Computing Scale Company; whereupon, the Ohio District Court ruled that because the ob-

jection to jurisdiction was made in the answer, obeying Rules 29 and 30 of the Equity Rules, the objection was thereby waived. The result is this peculiar dilemma that, if the Ohio District Court is correct, a party in obedience to Rules 29 and 30 states all his defenses in his answer, under a special appearance carefully avoiding the waiving of any of them, and by that very fact he deprives himself of his special appearance as well as his special objection to jurisdiction of the person. This cannot be true. A similar ruling of the Ohio District Court has been corrected by the Circuit Court of Appeals of the Sixth Circuit.

Grable v. *Killits,* 282 Fed. 185, 193.

See, also,

Dahlgren v. *Pierce,* 263 Fed. 841, 846.

But whether Rules 29 and 30 require the practice or not, the objection to the jurisdiction of the Court over the person was not waived. No party can impliedly waive what he expressly says that he does not waive.

Harkness v. *Hyde,* 98 U. S. 476.

Wabash R. Co. v. *Brow,* 164 U. S. 271.

The claim of petitioner that, when an attorney showing cause against a temporary injunction arises in court and states that he is ready to show cause and presents as his cause the answer above stated, he thereby waives the special appearance his answer makes, is too trivial for argument. A stenographer's report in the record (Printed Rec., red paging, 355) is said to control the recitals of the court record showing what was done. (Printed Rec., 100.)

X.

THE OHIO DISTRICT COURT HAD NO JURISDICTION TO ENTE TAIN EVEN A GOOD BILL ALLEGING FRAUD AS A GROUND FO SETTING ASIDE THE DECREE OF THE ILLINOIS DISTRIC COURT.

While this question is not necessary to a decisio here, we submit that it will decide the case without g ing into any other question. The most general princip bearing upon this question now proposed is long settle and established, that a court of equity as to any co troversy within its equitable jurisdiction is a court full, ample and complete power, authorized to decid every question concerning the controversy and to finall decide the litigation between the parties.

This jurisdiction extends to the utmost limits of th controversy, including a decree adjudging all the righ of the parties and securing to the prevailing party th fruits of his decree or to set aside a decree rendere and to substitute another and different decree, so th the entire controversy shall be ended.

French v. *Hay*, 22 Wall. 250, 253.

Looney v. *Eastern Texas R. Co.* 247 U. S. 21 221.

In this respect the jurisdiction of a court of equity di fers from that of a court of law. Under the rule of la existing when the respective limits of equitable and leg jurisdiction were settled, a court of law could not ente tain or decide questions of equitable cognizance. If court of law had rendered a judgment its power was e hausted by the issuance of an execution and the enforc ment thereof. A court of law could not entertain equitable defense to the case at law. It could not gra

a new trial for newly discovered evidence. It could not set aside its judgment for an extrinsic fraud. Hence for many hundred years has existed the equitable jurisdiction, first, to enjoin the enforcement of a judgment at law because of an equitable defense thereto not heard, second, to grant a new trial in an action at law on account of newly discovered evidence not discoverable by reasonable diligence, third, to set aside a judgment of law for fraud in its rendition extrinsic to the judgment at law.

Hence upon this question we may at once lay aside all the cases which support the jurisdiction of an equity court to set aside judgments at law for fraud, or to remove such cases into Federal Courts.

Barrow v. *Hunton*, 99 U. S. 80.
Marshall v. *Holmes*, 141 U. S. 589.
Wells Fargo & Co. v. *Taylor*, 254 U. S. 175.
Simon v. *Southern R. Co.* ~~287~~ 236 U. S. 115.

Under this head falls two cases much relied upon by petitioner:

Chicago, etc. R. Co. v. *Callicotte*, 267 Fed. 799, 810, was a judgment at law in a State court, and a bill in equity in the Federal Court. Fraud was claimed in the judgment. In the State court relief for the fraud was denied because the court at law had no jurisdiction (p. 810), and the Court of Appeals said that that remedy was exhausted. But the case is a judgment at law attacked for fraud, and has no bearing here.

Ocean Ins. Co. v. *Fields*, 2 Story, 59, 18 Fed. Cas. 532, was a bill in equity in the same court to set aside a judgment at law. Under *Krippendorf* v. *Hyde*, 110 U. S. 276 (approved in *Carey* v. *Texas and C. R. Co.* 161 U. S. 115, 130), the bill was a mere ancillary bill in the same

court, and Judge Story indicates that it is such a bill in his opinion.

We may also set aside as not germane to this question all the cases which hold that a bill in equity brought in a State Court to set aside *a judgment at law* for fraud may be removed, if facts of Federal jurisdiction are present, into a Federal Court of equity. Those cases have no bearing since the law court, in theory (and in practice where no statute gives it power), has no jurisdiction.

We now come to the jurisdiction of one Federal Court of equity to enjoin the enforcement of the decree of another court of equity of precisely the same general equitable jurisdiction. *The first point we suggest is that no reason exists for such a jurisdiction because the ground for the jurisdiction of equity to enjoin a judgment at law is based upon the rule of necessity that the court of law could not do so.* Since a court of equity has full power to set aside its own judgment and, unlike another court, is not driven to injunction but can act directly upon its own decree, it would seem that the direct and appropriate remedy is only in the court that has rendered the decree.

That every Federal equity court may set aside its own decree for fraud is beyond question.

> *Lacassagne* v. *Chapuis*, 144 U. S. 119, 126.
> *Pac. Ry. of Mo.* v. *Mo. Pac. Ry. Co.* 111 U. S. 505, 518, 522.

In this latter case a decree had been rendered in *Railroad Co.* v. *Ketchum*, 101 U. S. 289, and that decree had been attacked as fraudulent and this Court had said:

> "The remedy for the fraud or unauthorized conduct of a solicitor, or of the officers of the Corporation, in such a matter is by an appropriate proceed-

ing in the court where the consent was received and acted upon."

Then in that court a bill for fraud extrinsic, showing that no hearing had been had, was brought and the objection was to jurisdiction. It was held that the bill was ancillary, citing and approving to that effect *Minnesota Co.* v. *St. Paul Co.* 2 Wall. 609, 633.

The jurisdiction already obtained over the parties exists to the end of the controversy, and exists just as well for the purpose of setting aside or changing or reforming a decree as it does for rendering the decree in the first place.

The general rule also is that one equity court having a suit before it ought not to be interfered with by proceedings in another court, which would tend to embarrass the first court. This rule certainly applies in its fullest force where the first court has rendered a final decree.

There is another class of cases which must be set aside as not bearing upon this question. If a decree has been rendered in a State Court and an original bill is brought in the State Court to set aside that decree for fraud, if the facts warrant the jurisdiction of a Federal Court over that particular controversy, the Federal Court (there is some authority to show, but none in this Court) may under the Constitution of the United States take jurisdiction of the cause by removal; but whether or not the jurisdiction extends to entering a new decree instead of the former decree the authorities do not show. See *Graver* v. *Faurot*, 76 Fed. 257.

But that removal depends upon the language of the Constitution of the United States, and under that removal provision there may be some ground for contending that an original bill for fraud in the rendition of

the decree, brought in the court that rendered the decree, presents such a controversy separable from the final decree, as to satisfy the words of the Constitution in regard to Federal Courts' jurisdiction. But in *Nougue* v. *Clapp*, 101 U. S. 551, and *Randall* v. *Howard*, 2 Black, 585, 589, and *Graham* v. *Boston H. and E. R. Co.* 118 U. S. 161, 177, it was held that a Federal Court could not entertain a bill to set aside a decree in a State Court of Equity which has power to vacate its own decree. *Nougue* v. *Clapp* was approved in *Simon* v. *Southern R. Co.* 236 U. S. 115, and followed in *Furnald* v. *Glenn*, 64 Fed. 49 (C. C. A.) and *Strand* v. *Griffith*, 144 Fed. 828 (C. C. A.). These cases are in principle decisive of the question here. The converse is also true that no State Court of Equity can set aside the decree of a Federal Court for fraud.

Central Nat. Bank v. *Stevens*, 169 U. S. 432, 459.

If it be true, as the petitioner claims, that Federal Courts of Equity are foreign to each other, then *Central Nat. Bank* v. *Stevens*, 169 U. S. 432, 459, is a clear authority that the Ohio District Court had here no jurisdiction and the older case of *Peck* v. *Jenness*, 7 How. 612, 624, therein quoted, is in point. In principle the cases are clearly in point.

There are two exceptional cases of original bills of equity in Federal Courts to set aside for fraud Probate sales of minor's lands, but these are only apparent exceptions, for the Probate Court has no equitable jurisdiction.

Johnson v. *Waters*, 111 U. S. 640.
Arrowsmith v. *Gleason*, 129 U. S. 86.

But no original bill lies in a Federal Court to impeach

a probate of a will for fraud, for there the Probate Court has complete jurisdiction.

Broderick's Will, 21 Wall. 503.
Simmons v. *Saul*, 138 U. S. 439.

Gaines v. *Fuentes*, 92 U. S. 10, was put upon the ground of the prejudice statute as a removal case. That decision was called for in the light of the endless Gaines litigation, especially *Gaines* v. *Relf*, 12 How. 472, *Gaines* v. *Hennen*, 24 How. 553, *Gaines* v. *New Orleans*, 6 Wall. 642, and the prolonged effort to defeat the decisions of this Court.

But it is apparent that this consideration of removal can have no application as between two United States Courts of equity with the same general jurisdiction. And there is the amplest authority for saying that a bill brought in the United States Court for the purpose of setting aside for fraud a decree rendered by that court, presents the subject of an ancillary bill in further continuance of the equitable litigation. It is so said by this Court in an unbroken line of cases.

Terry v. *Bank of Alabama*, 92 U. S. 454, 456.
Milwaukee & M. R. Co. v. *Soutter*, 2 Wall. 609.
Pacific R. Co. v. *Missouri P. R. Co.* 111 U. S. 505, 522.
Carey v. *Texas and C. R. Co.* 161 U. S. 115, 130.

It is also true that this Court has always upheld the rule that a Federal Court of equity, having assumed proper jurisdiction over an equitable controversy and having rendered a decree will not permit the full accomplishment of that jurisdiction to be interfered with by any State Court upon a bill for fraud. *Central Nat. Bank* v. *Stevens*, 169 U. S. 432. The Federal Court

within the limits suggested by *Kline* v. *Burke, Const. Co.* (decided Nov. 20, 1922) and *Essanay Film Co.* v. *Kane* (decided April 10, 1922) has always protected its jurisdiction *in fieri.* But of course when the Federal Court's jurisdiction *has ripened into a final decree* it will not permit its decree to be interfered with. It may very well be that a suit in equity can be brought upon the same equitable cause of action and be pending at the same time in different courts, but after one of those courts of equity has rendered a decree adjudging the rights of the parties, a bill then brought to set aside such a decree or to enjoin its enforcement, thus interfering with the clear jurisdiction of the court to grant either the fruits of the decree or to set it aside, has never yet been entertained. *Essanay Film Co.* v. *Kane* (decided April 10, 1922) states that "in order to maintain the jurisdiction of a Federal Court, properly invoked, and render its judgments and decrees effectual proceedings in a state court which would defeat or impair such jurisdiction may be enjoined."

This applies with all the greater reason as between Federal Courts where no peremptory statute forbidding an injunction exists. Whether in this particular case the injunction sought to cancel supersedeas bonds in the custody of the Federal Court in Illinois would have the effect of interfering with property in the hands of the Illinois Court, we suggest, but do not further argue it, since there was here a decree rendered.

Upon a question of this kind the fact that such a proceeding in one Federal Court against another Federal Court's decree has not been attempted and is not recognized in the Federal practice, and has furnished no precedents, is the very best proof at least of the understanding of the profession and of the courts upon the point.

As appears above, all the cases proceed on the ground of necessity and between two Federal Equity Courts no such necessity is present as to cause one to act against the decree of the other.

In the English practice no bill lies in the English Chancery Court to impeach for fraud an Irish chancery decree. In the lower Federal Courts the rule is said to be that the remedy is in the court that has rendered the decree. *Firestone Tire Co.* v. *Marlboro Cotton Mills,* 278 Fed. 816, 824, *American Seeding Co.* v. *Dowagiac Mfg. Co.* 241 Fed. 875, 877.

There are cases in point to support the proposition in State courts:

Old Dominion Copper Co. v. *Bigelow,* 203 Mass. 159.

Morris v. *White,* 96 N. C. 91, 93.

Home Insurance Co. v. *Howell,* 24 N. J. Eq. 238.

O'Haire v. *Burns,* 45 Colo. 432.

Bigelow v. *Old Dominion Copper Co.* 74 N. J. Eq. 457, 474.

According to the decisions in this Court a bill brought after a final decree in the nature of a bill of review or to set aside the decree for fraud, either intrinsic or extrinsic in its rendition, is an ancillary bill in aid of the main litigation and is to be brought as an ancillary bill. It is, of course, true that an ancillary bill lies only in the court of the original case. This doctrine is fully explained in

Milwaukee & M. R. Co. v. *Soutter,* 2 Wall. 609, 633.

Same case, *Minnesota R. Co.* v. *St. Paul R. Co.* 2 Wall. 609, 633.

Pacific R. Co. v. *Mo. R. Co.* 111 U. S. 505, 522.

Carey v. *Texas and C. R. Co.* 161 U. S. 115, 130.

Central Nat. Bank v. *Stevens,* 109 U. S. 432.

In the first case it is said that such a bill, though original in the chancery sense, is a continuation of the former suit and that such jurisdiction is exclusive in the court that has rendered the decree. The last case is clear to the same point. This proposition is simply another way of stating that the court that has rendered the decree has jurisdiction to proceed with the whole controversy and to rectify any errors or wrongs that have been committed in its decree. It is but another way of asserting the general principle that the jurisdiction of a court of equity over an equitable controversy as to which it has made a final decree is ample to decide every question involved in that controversy, including the justness and correctness of its decree. This Court has steadily said that the remedy for fraud to set aside a decree lies in the court that has rendered the decree.

Terry v. *Bank of Alabama*, 92 U. S. 454, 456.
Railroad Co. v. *Ketchum*, 101 U. S. 289.
Pacific R. Co. v. *Missouri P. R. Co.* 111 U. S. 505, 522.
Carey v. *Texas and C. R. Co.* 161 U. S. 115, 130.

A rule so long settled and acted upon ought not to be disturbed. It would be a dangerous principle to introduce into the equitable jurisprudence of the United States to permit one United States Court to interfere with a decree in equity of another United States Court. The evil of such a practice is made plain in this very case. If such a rule is to be instituted now it would be well to remember that while men are mortal, suits will become immortal, or, to quote Judge Story (18 Fed. Cas. 539), "it is for the public interest and policy to make an end to litigation, as was pointedly said by a great jurist, that suits may not be immortal, while men are mortal."

XI.

THE ALLEGATIONS AS TO A CONSPIRACY TO MONOPOLIZE WERE IRRELEVANT IN ANY VIEW OF THE CASE.

Wilder Mfg. Co. v. *Corn Products Co.* 236 U. S. 165, 172.

Connolly v. *Union Sewer Pipe Co.* 184 U. S. 540.

XII.

THE COURT OF APPEALS HAD POWER TO ORDER A SUMMARY JUDGMENT AGAINST THE SURETIES.

Pease v. *Rathbun-Jones Co.* 243 U. S. 273, 278.

Certainly an Appellate Court cannot be as helpless as the Toledo Company's counsel argue.

JOHN M. ZANE,
CHARLES F. MORSE,
DRURY W. COOPER,
Counsel for Respondent, The Computing Scale Company.

IN THE

Supreme Court of the United States

October Term, 1922

No. 339

TOLEDO SCALE COMPANY,
Petitioner,

vs

THE COMPUTING SCALE COMPANY.

No. 388

FIDELITY & DEPOSIT COMPANY OF MARYLAND AND UNITED STATES FIDELITY & GUARANTY COMPANY,
Petitioners,

vs

THE COMPUTING SCALE COMPANY AND TOLEDO SCALE COMPANY.

REPLY BRIEF FOR TOLEDO SCALE COMPANY

FREDERICK P. FISH
EDWARD RECTOR
HARRY W. MORGAN
GEORGE D. WELLES,
Solicitors for Toledo Scale Company.

THOS. H. TRACY
RATHBUN FULLER
HORACE KENT TENNEY
Of Counsel.

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REPLY BRIEF FOR TOLEDO SCALE COMPANY

I. DISCUSSION OF RESPONDENT'S CONTENTIONS AS TO THE FACTS

The brief for the Computing Company is entirely predicated upon an inaccurate claim as to the character

of the applications and supporting proof presented by the Toledo Company to the Circuit Court of Appeals with respect to the Phinney Scale evidence. Upon this incorrect claim as to the facts the Computing Company bases some equally erroneous conclusions of law.

The claim as to the facts, reiterated time and again, is that Toledo Company submitted to the Circuit Court of Appeals three applications in the nature of bills of review, by which it sought leave of the Circuit Court of Appeals to introduce evidence as to the Phinney Scales and that these applications were each and all based upon the claim and supported by evidence that the Computing Company had bought up Phinney Scales and suppressed other Phinney Scales, had suppressed depositions with respect to the Phinney Scales and that this conduct upon the part of the Computing Company was for the purpose of preventing and had prevented Toledo Company from learning of the Phinney Scales and producing evidence as to Phinney's commercial practice.

Upon the above false assumption as to the facts the Computing Company bases the following claims as to the law:

> (1). That the Circuit Court of Appeals had jurisdiction to pass upon the question claimed, as above stated, to have been presented to it by Toledo Company, whether Toledo Company should be granted relief by reason of such fraudulent conduct of Computing Company.

(2) That the denial by the Court of Appeals of Toledo Company's applications is *res judicata* in a subsequent suit to enjoin enforcement of Computing Company's decree obtained by fraud.

(3) That the issues presented by the suit in the Ohio District being, as claimed, the same as those presented by the applications to the Circuit Court of Appeals, the Ohio suit constitutes a vexatious suit which should have been enjoined for that reason.

(4) That the Circuit Court of Appeals has jurisdiction to entertain an ancillary bill to enjoin a vexatious suit.

(5) That such ancillary bill does not constitute a collateral attack on proceedings had in a Federal Court in another circuit.

It is manifest that if counsel for the Computing Company are wrong in their claim as to the facts, all of their conclusions of law fall to the ground, even though they were otherwise sustainable which, in fact, they are not, as shown in our principal brief.

Anticipating that the foregoing claim as to the facts would be made by counsel for Computing Company, in view of their briefs below, we have to some extent discussed it in our brief herein, particularly pages 96 to 104. As the claim of the Computing Company is now put, however, it is this:

"Substantially all that was new over 1913 in the bill in Ohio was a charge that *almost* all

> instead of *some* Phinney Scales had been bought up and all that was new in the affidavits filed in support of the bill in the Ohio District was the affidavit of Koehne." (Brief of the Computing Company, p. 21) (Italics are theirs.)

The allegation in the Ohio bill is that the Computing Company purchased and took into its possession "all" (of the Phinney Scales) "of which it could obtain possession and all but one or two of said Phinney Scales which were then in the hands of the users thereof" (Record p. 18).

It is, we think, clearly apparent that the difference between legitimately having some of the Phinney Scales in its possession on the one hand, and searching for and obtaining possession of *all* which it could find on the other, is the difference between innocence and fraud. The Computing Company as a result of or in connection with its patent litigation might properly, innocently and for an entirely legitimate purpose come into possession of *some* of the Phinney Scales, but it could not properly, innocently and legitimately set out to find and purchase all of them and carry out this plan so far as it was able, and to almost complete success, when its purpose and intent in so doing was to secrete and destroy evidence against it.

There is no question but that in the affidavits which were presented to the Court of Appeals upon the application made to it to modify its mandate on the first appeal Toledo Company showed that Court,

that there were *some* Phinney Scales in the possession of the Computing Company and its counsel; that the Computing Company had long had knowledge of Phinney's commercial practice as a result of depositions taken in the Federal Scale case, and that these depositions under a stipulation of counsel in the Federal Scale case, had not been filed. This evidence, of course, showed that the Computing Company knew that Phinney had made scales with light weight paper covered cylinders before Smith applied for his patent and that having this knowledge, the Computing Company said nothing about it, either to Toledo Company or to the courts, and had undertaken notwithstanding this knowledge to enforce the Smith Patent. What this evidence showed was that Computing Company had concealed from the Court and from Toledo Company its *knowledge* of the fact that there was a defense. It did not show that Computing Company had secreted and concealed the *evidence* of the defense. The affidavits of 1913 do not show that the Computing Company did anything except to keep silent as to its own knowledge, or that it did anything which operated to prevent Toledo Company from learning of the Phinney Scale evidence and offering it in evidence to the trial court, and there was no suggestion, either in the applications or in the affidavits supporting them, that Computing Company had formed any plan or design or done anything in pursuance of such plan or design to keep Toledo Company from obtaining this evidence. Contrast this situation now with what appears in the record in the Ohio case.

1. There is the difference which counsel for Computing Scale Company point out that in the Ohio bill it is charged that the Computing Company instead of merely having *some* Phinney Scales had *all it could get hold of* in its possession and that these were all but one or two of those which were in existence.

2. The Ohio bill charges a deliberate plot, a conspiracy directed against Toledo Company and other competitors of the Computing Company, to harass them with litigation based upon the Smith Patent; that the Computing Company knew this patent was no good and that to enable it to maintain its suit based on this patent it went out and bought up all of the Phinney Scales which it could find and believed it had bought them all before bringing the present suit against Toledo Company.

3. That Computing Company was advised by its counsel that the Phinney Scales and the evidence of their use constituted a complete defense to the Smith patent, and that it therefore employed new counsel to bring the present suit, concealing from such new counsel both the fact that Phinney had ever made scales and the fact that the Computing Company had purchased and secreted them.

4. That in the Ohio case it appears that the Computing Company for the deliberate purpose of making their knowledge (not acquired in confidence)

of Phinney Scales unavailable to others, Computing Company kept on retainer its lawyers who were in the Federal Scale litigation, but never again asked them to assert the validity of the Smith Patent.

5. That the Computing Company kept on its pay-roll Ira Chase Koehne until long after it had obtained its decree against Toledo Company on the Smith Patent, and that it kept Koehne under pledge of secrecy during all of that time as to the frauds it had committed upon Toledo Company.

6. That it was paying Smith, the patentee of the Smith Patent, a royalty on the patent until after the first decree on the merits in the District Court in Illinois, and for some time had a contract with him to manufacture scales for it under the patent, and thus through self interest sealed his mouth.

All of these things were new things which had not been presented to the Court of Appeals in the (*two* not three) applications which were made to it, in the affidavits filed in support of the applications or in any briefs filed by counsel. It appeared from the Ohio bill of complaint that Toledo Company had no knowledge of these frauds until on or about December 20, 1921. It therefore could not have presented them in the various proceedings prior to that date in the Court of Appeals.

It is of course true that the facts which were before the Court of Appeals on the applications to it, are a *part* of the facts which were presented by the bill and supporting affidavits in the District Court in Ohio. But counsel for Computing Company have, by making the claim again and again, sought to impress upon the court that *everything* of any materiality which is presented by the bill and affidavits in the Ohio District was also presented by the applications and affidavits in the Court of Appeals in 1913, even to the three Phinney scales, Providence Exhibits 1, 2 and 3, which were in fact never brought into the Seventh Circuit proceedings in any way until Phinney's deposition was taken in *1917* (Note that his affidavit given in January of 1913 refers only to one Phinney scale and a sample drum, Record 164.) As we have shown, even they are forced to the admission of one vital difference between the two records—that the Court of Appeals record merely shows *some* scales in the Computing Company's possession, while the Ohio record shows it had *all that it could find,* in its possession. Another allegation of fact which counsel for the Computing Company persistently overlook, which is found in the Ohio record, and not in the Court of Appeals record, is the allegation of the *purpose and int nt* with which the scales were taken into the possession of the Computing Company. The Court of Appeals applications and affidavits are silent as to this, whereas the Ohio record expressly alleges

the fraudulent and wrongful purpose of the Computing Company to obtain Phinney Scales for the purpose of suppressing them and concealing them from Toledo Company. A third allegation of fact which is found in the Ohio record, but not in the Court of Appeals record, is the *effect* of the conduct of the Computing Company. In the bill and affidavits in the Ohio record it is distinctly alleged that the fraudulent purpose and suppression of the Phinney Scales by the Computing Company *was the thing and the only thing which operated to prevent Toledo Company's learning of and making use of this evidence.* In the Court of Appeals record there is no averment of this kind. No claim is made, either in the applications or affidavits, that the fact that the Computing Company had *some* Phinney Scales in its possession had any effect by way of preventing Toledo Company from learning of Phinney Scales and obtaining evidence with respect to them. The most that was claimed by Toledo Company in the Circuit Court of Appeals for the suppression by Computing Company of its knowledge was in effect that it was not entitled to assert laches as against Toledo Company, because it itself had knowledge all the time of the facts and said nothing about them, and therefore should not be permitted to claim that any burden had been imposed upon it by Toledo Company's failure to learn of the scales.

The statement in the brief of respondent at page 13 as to what is shown by the affidavits with respect

to the sale of Phinney Scales is not correct. The Ohio record shows Phinney Scales were disposed of as follows:

	Scales
To John Devlin's father (Record p. 175)	1
To John Devlin (Record p. 175)	1
To Joseph McNally (Record p. 174)	1
To Daniel C. Fallon (Record p. 176)	1
To E. Willard Horton (Record p. 177)	1
To Charles H. Tierney's father (Record p. 177)	1
To Landers, Frary & Clark (Record p. 178)	2
To William M. Raymond (Record pp. 181, 164)	2
To Albert U. Smith (Record pp. 167, 157)	1
To J. Hill England (Record p. 164)	1
To Dexter's Market, Providence (Record p. 165)	1
To 223 Cranston St., Providence (Record p. 165)	1
To some unknown person said to have been connected with the Boston Computing Scale Company (Record p. 165)	3
Loaned to Howson & Howson by Thomas Phinney (Record pp. 163, 2553, 2556, 2560)	3

As no record was kept of how many scales were made or to whom they were sold, it is highly improbable that the above is a complete list. Of the above the two which were obtained by Landers, Frary & Clark did not come into the possession of the Computing Company. These were finally destroyed (Record p. 65). The scale which was sent to England, so far

as the record shows, did not come into the possession of the Computing Company. Tierney turned his scale over to Thomas Phinney in 1913 (Record p. 62). One of Raymond's was broken and returned to Phinney (Record p. 164). This makes five out of the above list that the Computing Company did not obtain. The Ohio record shows or tends to show that the remainder of the scales all got into the possession of the Computing Company. Smith states positively that the only Phinney scale in his possession was sent to the Computing Company by its orders (Record p. 167). McNally sold his to the Computing Company through Horton (Record pp. 60, 62). This makes two. Raymond sold the Computing Company one of his scales. This makes three. Horton sold the Computing Company his (Record p. 62). This makes four. The three which were loaned to Howson & Howson were borrowed by the Computing Company's counsel and so came into its possession. This makes seven. The Computing Company bought all of the property and assets of the Boston Computing Scale Company, presumably including the three scales which the person said to have been connected with that Company bought. This makes ten. The scales owned by John Devlin's father, John Devlin, Daniel Fallon and at Dexter's Market in Providence and at 223 Cranston Street in Providence, one at each place, making five in all, are accounted for by the affidavit of Thomas Z. Phinney (Record p. 163) and the affidavit of Marcus

C. Shurtleff (Record p. 168) to the effect that when they went around to see the old users of Phinney Scales, they could not find any, being informed by the former owners that the Computing Company had been engaged in purchasing them. Among these are in all probability the two which James Coffey says were shipped to the Computing Company from its Boston office in 1909 or 1910 (Record p. 408).

With sufficient certainty for an interlocutory hearing, it appears from the above that out of twenty scales of the Phinney make, fifteen were gathered in and suppressed by the Computing Company, and of the remaining five, two had been destroyed, a third had been broken and discarded and a fourth sent to England, leaving only one scale—that owned by Tierney, which the Computing Company failed to bring under cover.

The affidavits filed in support of the applications to the Circuit Court of Appeals for the Seventh Circuit did not show that the Computing Company had ever acquired possession through itself or its counsel of any scales other than the three scales which Howson & Howson had loaned to Church & Church, and four scales which Bert W. King says were in its possession at Dayton (Record 180). Presumably these four scales were the ones which the Ohio record shows came, one from Smith and three from the Boston Computing Scale Company. This leaves at least eight scales that the Ohio record shows or tends to show the

Computing Company gathered in, in addition to those referred to in the affidavits filed in the Circuit Court of Appeals.

If all that the Computing Company had done was to come into possession of four of the Phinney scales through its connection with the Boston Computing Scale Company and Smith, and by its counsel of three more, and at least eight more had been left outstanding in the hands of the public without any effort upon the part of the Computing Company to gather them in or suppress them, it seems manifest that no claim could have been made or sustained, if made, that the Computing Company had *fraudulently* gathered in Phinney scales and so kept Toledo Company from obtaining them and making proof of their use. When we go further, as we do in the Ohio case, however, and prove at least eight additional scales coming into the possession of the Computing Company, prove that these were, so far as is now known, all but one of the scales which were ever put out in the hands of the public in this country, (and that it had repeatedly tried to purchase this one, Record p. 62), and prove by one of the participants in the activities of the Computing Company that its purpose in gathering in these scales was the express purpose of defrauding Toledo Company by keeping it from learning of the scales and using them in evidence, and of imposing upon the courts, we submit, an entirely different case is made. It is true, we show in both courts the same seven scales in the possession of

the Computing Company; but that does not prevent the issues from being entirely different. One might be accused of having stolen goods in his possession and proof might be offered in support of this charge that he had the goods in his possession. The same man might be charged with stealing the same goods and others and proof that he had the same goods and others in his possession might be offered, supplemented by proof that he wrongfully took them into his possession. But the mere fact that in both cases the goods first mentioned are shown to be in the possession of the same individual does not make the charges the same. It might just as easily be claimed that yellow and green are identical because green has yellow mixed with blue in its composition.

II. COMPARISON OF OPINIONS OF CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

Notwithstanding the claim to the contrary on page 50 of respondent's brief, the proceedings in the Court of Appeals to enjoin the Ohio suit are clearly a collateral attack upon the latter.

A comparison of the opinions of the Circuit Court of Appeals for the Seventh Circuit (Record p. 478 et seq.) and the District Court in Ohio (Record p. 445 et seq.) shows that they agree upon the following points:

1. The District Court in Ohio had jurisdiction to entertain an original and independent bill to enjoin enforcement of the decree obtained by the Computing Company in the Seventh Circuit, if such decree was obtained by extrinsic fraud.

2. The Circuit Court of Appeals for the Seventh Circuit had no jurisdiction to entertain a bill of review or petition in the nature of a bill of review based on extrinsic fraud.

3. Toledo Company in the District Court in Ohio made a *prima facie* showing that the Computing Company had bought up all of the Phinney scales it could find, for the purpose of preventing Toledo Company from using them in evidence in the District Court in Illinois.

4. Toledo Company did not use Phinney scales or any evidence of their use in the first trial in the District Court in Illinois.

5. The Ohio bill shows that Toledo Company had no knowledge until after the conclusion of the first trial in the District Court in Illinois and the appeal from that court had been perfected, that Phinney had made scales; and the Computing Company knew that Toledo Company had no such knowledge.

6. The conduct of Computing Company as alleged by Toledo Company is " counter to one's sense of ideal fair play." (CCA opinion Record p. 485).

The District Court in Ohio held that the Ohio record charged *ex*trinsic fraud and that Computing Company ought to be temporarily enjoined from enforcing its decree, pending full investigation of its alleged fraudulent conduct.

The Circuit Court of Appeals held upon considering the Ohio record that it charged *in*trinsic fraud and that the Computing Company ought not to be so enjoined, but on the contrary, that Toledo Company ought to be enjoined from seeking any investigation of the fraudulent conduct of the Computing Company.

It is clear from the foregoing that the holding of the Circuit Court of Appeals was based, not upon any lack of jurisdiction of the District Court in Ohio, but upon a disagreement by the Court of Appeals with the conclusions of the District Court on the merits of the questions presented by the Ohio bill. The Court of Appeals stated that in taking up the question they would "endeavor to bear in mind throughout that the Ohio bill is not before us on demurrer, nor is the temporary injunction here on appeal." (Record p. 481) In fact, however, as the above analysis shows, their endeavor was unsuccessful. Their opinion shows that they decided the question before them exactly as if the bill were before them on demurrer and the injunction on appeal. In fact, they even went so far as to consider the weight of the evidence, particularly in their attempt to determine that the fraud of the Computing Company was not the proximate cause of the absence of Phinney scales from the original record in the District Court in Illinois (Record p. 485).

III. THE COMPUTING COMPANY WAS PROPERLY SUED IN THE NORTHERN DISTRICT OF OHIO

An argument is presented at pages 61 et seq. of the brief for the Computing Company in support of the claim that the District Court in Ohio had no jurisdiction of the person of the Computing Company. This argument assumes that that court could have no jurisdiction of the Computing Company unless it voluntarily entered its appearance in the case. In fact, as we have shown in our principal brief at pages 24 et seq. (See particularly the authorities on page 37), Computing Company *did* voluntarily enter its appearance; but even had it not entered its appearance, the jurisdiction of the court over its person is equally clear. The suit was started in the Northern District of Ohio Western Division, and the Bank defendants were all residents of that District and all but one of them of that Division. The Computing Company is an Ohio corporation having its principal office in the Southern District of Ohio and, under Jud. Code Sec. 52 the court acquired full jurisdiction of the person of the Computing Company by the service upon it of the subpoena issued upon the filing of the bill. No motion to quash or other attempt to set aside this service was made.

IV. DISCUSSION OF RESPONDENT'S CONTENTIONS AS TO THE LAW

We have in our principal brief discussed a number of authorities relied upon by counsel for respondent in their brief, and shall not here repeat that discussion. Lack of space will prevent our discussing all of the remaining authorities in respondent's brief. We have read them all, however, and desire to point out that *there is no authority cited holding or stating that one Federal Court has no power to enjoin enforcement of the decree of another Federal Court which was obtained by extrinsic fraud.* This is the proposition which counsel for respondent must establish. If they do establish it and this court so decides, it will be the first time any court has so held. A brief discussion of some of the authorities relied upon by respondent follows:

Ricker v. *Powell,* 100 U. S. 104, is cited by respondent, a number of times, in support of the claim that Toledo Company had no right to file an original bill, based on the Computing Company's fraud, in the District Court in Ohio, but could only apply to the courts of the Seventh Circuit for leave to file a bill of review. The case has no bearing upon this question whatever. The following brief excerpt from the syllabus shows what the court there decided:

> "C * * * * * filed a petition below, May 21, 1879, for leave to file a bill of review for alleged errors of law, being the same as those passed upon by this court upon the appeal, and for newly discovered evidence, but although

> the decree was in full force he neither offered to pay the same or any part thereof, nor allged any reason for not doing so. *Held,* that leave to file the bill rested in the discretion of the court below and was properly refused."

Hopkins v. *Hebard,* 235 U. S. 287, (Respondent's brief 52) is equally remote. In that case the Supreme Court affirmed the action of the Circuit Court of Appeals for the Sixth Circuit in denying a bill of review for newly discovered evidence. Titles to land were involved in the suit and innocent purchasers had acquired rights prior to the filing of the bill of review, and no fraud was claimed. The second paragraph of the syllabus reads:

> "The relief prayed by a bill of review for newly discovered evidence is a matter of sound discretion and not of absolute right, and even though the evidence be persuasive of error in the former decree, the bill of relief should not be allowed if it should result in mischief to innocent parties."

Nougue v. *Clapp,* 101 U. S. 551; *Randall* v. *Howard,* 2 Black 585; and *Graham* v. *Boston, Hartford & Erie R. Co.,* 118 U. S. 161, 177, cited at page 68 of the brief for Computing Company as holding, "that a Federal court could not entertain a bill to set aside a decree in a State court of equity which has power to vacate its own decree," are not in point here. The frauds complained of in those cases were *intrinsic,* not *extrinsic* frauds, and the suits in the State courts were foreclosure suits in which real estate was in the possession and control of the State court. For both

reasons, therefore, the State courts were the only ones which could give relief. Here the suit is *in personam*, no property is in the possession of the courts of the Seventh Circuit, and the frauds complained of are *extrinsic*. The three cases above cited are all distinguished by this court in *Marshall v. Holmes*, 141 U. S. 589, 600, from cases such as that presented by the Ohio bill of Toledo Company.

It is said on page 72 of the brief for Computing Scale Company:

> "This Court has steadily said that the remedy for fraud to set aside a decree lies in the Court that has rendered the decree."

In support of this statement are cited:

> Terry v. Bank of Alabama, 92 U. S. 454, 456.
> Railroad Co. v. Ketchum, 101 U. S. 289.
> Pacific R. Co. v. Missouri P. R. Co., 111 U. S. 505, 522.
> Carey v. Texas and C. R. Co., 161 U. S. 115, 130.

These cases support the proposition, which we have always conceded, that remedy *may* be had by an original bill alleging fraud in obtaining a decree filed in the *District* Court that rendered the decree, but they do not hold that the remedy *must* be there obtained, nor do they hold that *the* remedy for fraud is in that Court.

To the same point counsel assert on page 70:

> "Upon a question of this kind, the fact that such a proceeding in one federal court against another federal court's decree has not been attempted and is not recognized in the federal practice and has furnished no precedents is

> the very best proof at least of the understanding of the profession and of the courts upon the point."

On pages 87, 88 and 89 of our brief we cite and quote from *Chapman & Co. vs. Montgomery Water Power Co.*, 127 Fed. 839, 842; *Kirk vs. United States*, 124 Fed. 324, 340, affirmed by Circuit Court of Appeals in 130 Fed. 112; in both of which cases it was held that injunctions were properly issued by one federal court to restrain execution of the judgment of another federal court, and we cite many other cases stating that the same rule applies to all courts, either state or federal. No argument has been or can be advanced why a federal court in equity may not restrain the enforcement of a decree of another court in equity if it may, as has been held, restrain the enforcement of a judgment at law of another federal court. Whether the original action in the federal court is at law or in equity that court may entertain as an ancillary proceeding a bill to enjoin enforcement of the judgment or decree for fraud. As this Court has repeatedly held, however, while this suit *may* be treated as ancillary for the purpose of federal jurisdiction, it is in fact a new and independent bill in chancery and as such may, of course, be filed in whatever forum the plaintiff may select.

The Circuit Court of Appeals was of the opinion that a suit to enjoin enforcement of a decree rendered in a patent suit for fraud in its procurement must be brought in the court in which such decree had been entered, arguing that if such a new suit for fraud

could be brought in some other Federal Court, it might as well be brought in some state court, which would thus be called upon to treat the question of invalidity of the patent, and thus state courts would be deciding patent questions, which are within the sole jurisdiction of Federal Courts. Apparently to the same point, counsel for respondent at pages 68 and 69 of their brief cite *Broderick's Will*, 21 Wall. 503, and *Simmons v. Saul*, 138 U. S. 439, to the proposition that an original bill will not lie in the Federal Court to impeach the probate of a will for fraud. Passing the point that in *Broderick's Will* it is indicated that if sufficient equities are presented, relief may be granted in equity in such cases, a complete answer to the contention is found in the decision of this court in *Pratt v. Paris Gas, Light & Coke Co.*, 168 U. S. 255. The second paragraph of the syllabus in that case reads:

> "When a state court has jurisdiction both of the parties and the subject matter as set forth in the declaration, it cannot be ousted of such jurisdiction by the fact that, incidentally to his defense, the defendant claims the invalidity of a certain patent."

In the opinion the court cites with approval a number of cases, among others *Bliss v. Negus*, 8 Mass. 46, of which it says it was there held:

> "The defendant might show that the patent had been obtained by fraud and perjury."

At page 259 this court said:

> "Section 711 does not deprive the state courts of the power to determine *questions* arising under the patent laws, but only of assuming jurisdiction of *'cases'* arising under those laws. There is a clear distinction between a *case* and a *question* arising under the patent laws."

We submit that while it is true that Toledo Company's Ohio bill presents a *question* under the patent laws, i. e., whether the Phinney scale evidence is material as a defense to the Smith patent, it is not a *case* arising under the patent laws. As we have shown in our principal brief, it is not necessary for the court in Toledo Company's Ohio suit to proceed to an adjudication of invalidity of the patent, but even if it were compelled to do so, as suggested by the Circuit Court of Appeals for the Seventh Circuit, there is nothing in the patent laws which would prevent its doing so or prevent a state court in like situation from doing so under *Pratt v. Paris Gas, Light & Coke Co. supra.*

V. RESPONDENT'S CONTENTION THAT ITS SCALE WAS NOT DISHONEST

This question is not one which can be tried out in this case. It has been judicially determined that the scale *was* dishonest and that the argument advanced in support of it on pages 29, 30 and 31 of respondent's brief is not correct. See the opinion of Judge Hollister, particularly, pages 74-77 inclusive of the present record, and reference at page 76 to what was held by

the Supreme Court of Massachusetts in *Moneyweight Scale Co.* v. *McBride*, 199 Mass. 503, as to the dishonesty of the scale.

VI. CONCLUSION

The argument found at pages 38 to 41 of respondent's brief to the effect that this court, upon the present certiorari proceedings, will not review the action of the courts below upon the patent and accounting questions, is, we believe, fully answered by the argument and authorities presented in our brief at page 173 et seq. If we understand the position of the Computing Company correctly, it is that while this court has power to review the courts below on these questions, it ought not to do so, for the reason that Toledo Company "on the questions of fact involved and upon the matter of the newly discovered evidence * * * has had the benefit of the judgment of Judge Landis in the District Court and of Judges Baker, Kohlsaat, Wright, Seaman, Carpenter, Evans, Alschuler and Mack at different hearings in the Circuit Court of Appeals." (Brief 39) One trouble with this statement is that it is not so. Not one of the judges named has ever considered the merits of the question as to whether Phinney's commercial practice constitutes a defense to the Smith patent. Toledo Company has not had the benefit of their judgment at all on this question.

We submit that the real reason Computing Company makes no reply to that part of Toledo Company's brief on the Phinney scale evidence is that on the merits of that issue no argument can be advanced to support the Smith patent. The Computing Company has always taken this position. It abandoned the Federal Scale litigation when the Phinney scales were brought in; it abandoned the Randall litigation when the Phinney scales were brought in; and it abandoned the Standard litigation when the Phinney scales were brought in; and it now defaults for argument upon the issue presented by the Phinney scales.

In view of all the circumstances shown by the present record, we submit that there is no reason why this court should not, and every reason why it should, proceed to exercise its undoubted power to review the patent and accounting questions and do justice between these parties, once and for all.

Respectfully submitted,

FREDERICK P. FISH
EDWARD RECTOR
HARRY W. MORGAN
GEORGE D. WELLES,
Solicitors for
Toledo Scale Company.

THOS. H. TRACY
RATHBUN FULLER
HORACE KENT TENNEY
Of Counsel.

Office Supreme Court
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WM. R. STANS

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 388.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND AND UNITED STATES FIDELITY AND GUARANTY COMPANY,
Petitioners,
vs.
THE COMPUTING SCALE COMPANY AND TOLEDO SCALE COMPANY,
Respondents.

No. 389.

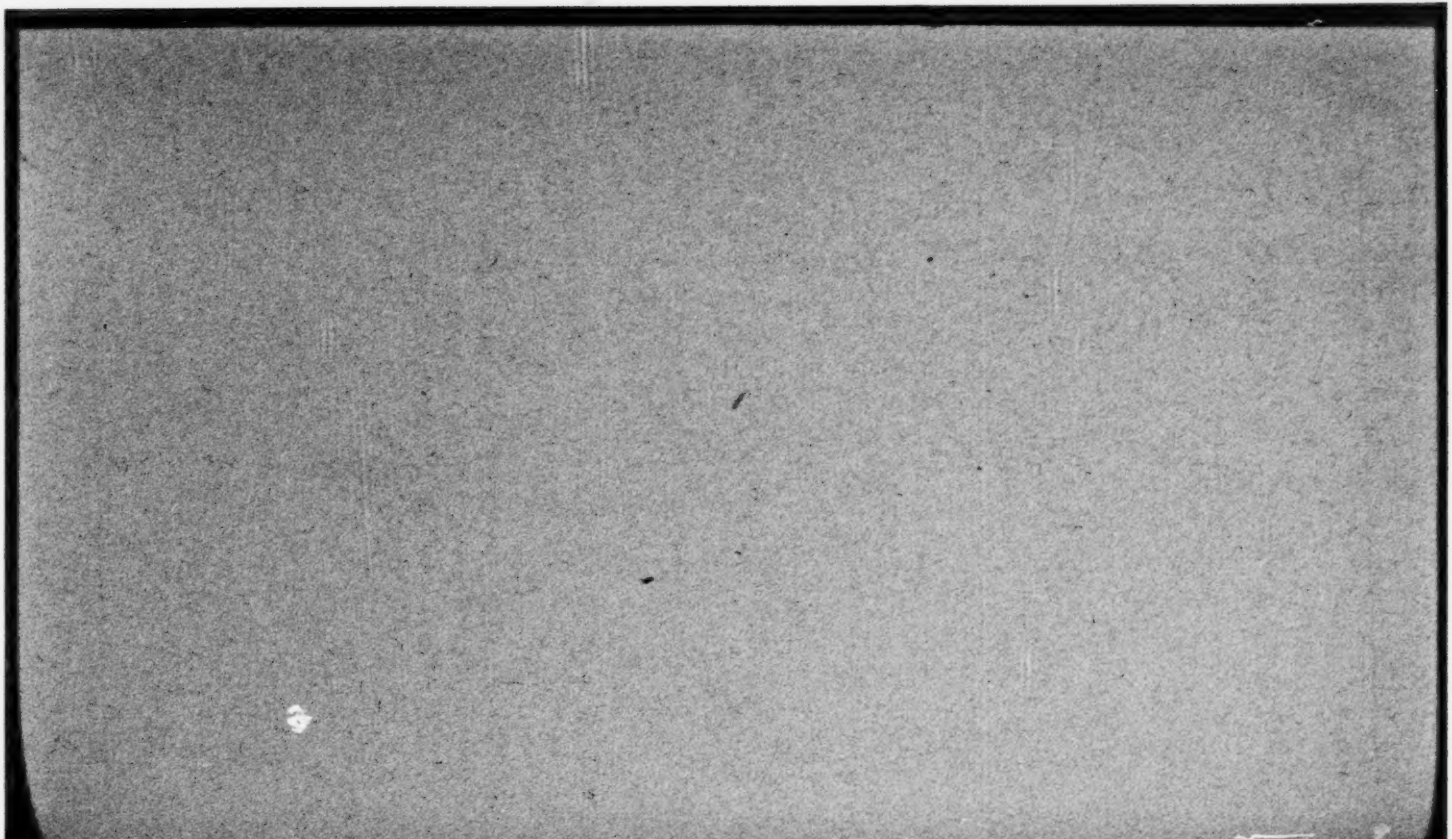
TOLEDO SCALE COMPANY,
Petitioner,
vs.
THE COMPUTING SCALE COMPANY,
Respondent.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR FIDELITY AND DEPOSIT COMPANY OF MARYLAND AND UNITED STATES FIDELITY AND GUARANTY COMPANY, PETITIONERS IN No. 388.

EDWARD OSGOOD BROWN,
EDWIN J. MARSHALL,
CHARLES MARKELL,
Counsel for Fidelity and Deposit Co. of Maryland and United States Fidelity and Guaranty Co., Petitioners in No. 388.

King Bros., Inc., Printers, 502 N. Calvert Street, Baltimore, Md.



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FIDELITY AND DEPOSIT COMPANY OF MARYLAND and UNITED STATES FIDELITY AND GUARANTY COMPANY,
Petitioners,

vs.

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Respondents.

No. 339.

TOLEDO SCALE COMPANY,
Petitioner,

vs.

THE COMPUTING SCALE COMPANY,
Respondent.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR FIDELITY AND DEPOSIT COMPANY OF MARYLAND AND UNITED STATES FIDELITY AND GUARANTY COMPANY, PETITIONERS IN No. 388.

These are two writs of certiorari to review the same decree of the Seventh Circuit Court of Appeals. Both cases are presented on the same Record, viz., the Record in No. 339. The

petitioners in No. 388 will be called the "Bonding Companies," Toledo Scale Company the "Toledo Company" and The Computing Scale Company the "Computing Company."

The question at issue (so far as the Bonding Companies are concerned) is narrow, but vital.

The Computing Company got a final decree for upwards of $420,000 against the Toledo Company in a patent infringement case in the District Court for the Northern District of Illinois, Eastern Division. The Toledo Company appealed to the Seventh Circuit Court of Appeals and superseded the decree. The Bonding Companies are sureties on the supersedeas bond. On this appeal the decree of the District Court was affirmed by the Seventh Circuit Court of Appeals. (*Computing Scale Co. vs. Toledo Computing Scale Co.*, 279 Fed. 648.) Certiorari was denied by this Court on January 9, 1922. (257 U. S. 657.)

The Toledo Company then filed in the District Court for the Northern District of Ohio a bill against the Computing Company, the Bonding Companies and certain banks for an injunction against enforcement of the decree in Illinois. A restraining order and, subsequently on February 13, 1922, a temporary injunction were granted. From this temporary injunction the Computing Company appealed to the *Sixth* Circuit Court of Appeals. That appeal is now pending.

Meanwhile, however, the Computing Company had applied to the *Seventh* Circuit Court of Appeals, which on March 25, 1922, entered an order in the patent case for a mandate (1) to enter affirmance of the final decree, (2) to enjoin the Toledo Company from maintaining its Ohio bill, and (3) to *enter summary decree against the Bonding Companies* for the full amount of the decree against the Toledo Company, including interest and costs. (*Toledo Scale Co. vs. Computing Scale Co.*, 281 Fed. 488, 500.)

To review this order this Court granted two writs of certiorari on the applications (1) of the Toledo Company and (2) of the Bonding Companies. (U. S. .)

The question here (so far as the Bonding Companies are concerned) is, *whether the Seventh Circuit Court of Appeals exceeded its jurisdiction in ordering the Bonding Companies* **to pay** *after the District Court in Ohio had enjoined the Bonding Companies* **not to pay.** The Bonding Companies are ready and willing to pay *once;* they are in danger of being compelled to pay the same $500,000 *twice.* By one United States Court they are ordered *to pay;* by another United States Court they are ordered *not to pay.* By *contract* they guaranteed *payment* by the Toledo Company to the Computing Company. By *decree* the Seventh Circuit Court of Appeals would compel them to underwrite the contentions of that Court in a controversy with the District Court in Ohio—to guarantee *repayment* by the Computing Company to the Toledo Company in case the Seventh Circuit Court of Appeals should *not* ultimately prevail in that controversy.

In other words, the question is, whether the Seventh Circuit Court of Appeals can compel the Bonding Companies, at their peril, to decide a controversy between that Court and a District Court in another circuit.

Statement of the Case.

On May 23, 1910, the Computing Company instituted suit in equity for alleged infringement of patents against the Toledo Company (then Toledo Computing Scale Company) in the United States District Court for the Northern District of Illinois, Eastern Division. An interlocutory decree for the plaintiff on June 24, 1912, was on April 15, 1913, reversed by the Seventh Circuit Court of Appeals and the case was remanded for further proceedings. (*Toledo Computing Scale Co. vs. Computing Scale Co.,* 208 Fed. 410; Record, pages ~~46-52.~~) On May 4, 1914, a decree of the District Court ordered a reference to a Master, who, on May 6, 1918,

made his report. On March 5, 1919, the District Court, affirming the Master's report, entered final decree for $420,883.44. On October 4, 1921, this final decree was affirmed by the Seventh Circuit Court of Appeals (*Computing Scale Co. vs. Toledo Computing Scale Co.*, 279 Fed. 648.) On January 9, 1922, application by the Toledo Company for certiorari was denied by this Court. (257 U. S. 657.) The Record filed on that application for certiorari comprised three large volumes. That Record is a part of the Record in the present cases (No. 339 and No. 338).

On March 11, 1919, the Bonding Companies as sureties and the Toledo Company as principal executed a supersedeas bond for $450,000 to stay execution on the final decree of the District Court pending the appeal of the Toledo Company to the Circuit Court of Appeals. About November 15, 1921, one of the Bonding Companies executed a second supersedeas bond for $50,000 to stay the mandate of affirmance by the Circuit Court of Appeals pending application by the Toledo Company to this Court for certiorari. To secure and indemnify the Bonding Companies as sureties on the first bond the Toledo Company delivered to one of the Bonding Companies certified checks for $450,000 drawn by the Toledo Company on certain Toledo (and one Cleveland) banks and trust companies. These banks and trust companies are hereafter called the "Banks." These checks were deposited by the Bonding Company, which received and still holds individual certificates of deposit for $450,000 payable on demand, issued by the Banks. When the second supersedeas bond was executed it was agreed between the Toledo Company and the Bonding Company that the accumulated interest on the certificates of deposit, then about $25,000, should be held by the Bonding Company as additional security to indemnify it as surety on the second bond. This $450,000 had been borrowed from the Banks by the Toledo Company, which assigned bills receivable and gave other collateral to secure these

loans from the Banks. (Record, pages ~~174-176, 178-182,~~ ~~245-248, 279-281, 284-288, 416.~~) 28-30, 33-35, 37-40. 441

On January 9, 1922 (the same day on which its application for certiorari was denied by this Court) the Toledo Company filed in the District Court for the Northern District of Ohio, Western Division, its bill of complaint, with exhibits, and motion for temporary restraining order and preliminary injunction, against the Computing Company, the Bonding Companies and the Banks. [Only one of the Bonding Companies was named in the original bill but by amendment on January 11, 1922, both were included. On January 19, 1922, a second amendment, not now material, was made.] (Record, pages ~~226-290.~~) On the same day (January 9, 1922), pursuant to the prayers of the bill a temporary restraining order was signed enjoining (*a*) the Computing Company from enforcing its *judgment* [*sic*] (*i. e.*, decree) for $420,883.44, (*b*) the Bonding Company (1) from making any payment on the supersedeas bonds and (2) from cashing the certificates of deposit, and (*c*) the Banks from paying the certificates of deposit. [On amendment of the bill on January 11, 1922, a similar temporary restraining order was forthwith signed, enjoining the second Bonding Company.] (Record, pages ~~291-294.~~) 317-320

The gravamen of the bill (very briefly summarized) is that the Computing Company procured its decree in the Northern District of Illinois by active fraud, practiced on the Toledo Company and on the Courts, by secretly buying in and suppressing, in anticipation of that suit, all the scales made by one Phinney that it could possibly buy, thus preventing the Toledo Company from discovering and showing in time a prior use by Phinney that would have invalidated the patent (Smith) on which the Computing Company procured its decree. The Toledo Company contends (and the District Court for the Northern District of Ohio holds) that such active fraud is *extrinsic* to the matters tried in the Northern District of Illinois, could not have been there pre-

sented by bill of review, can be made the basis of another independent bill in another court to enjoin enforcement of the decree procured in the Northern District of Illinois, and was, with due diligence, only discovered by the Toledo Company late in 1921. The Toledo Company (and likewise the District Court for the Northern District of Ohio) distinguishes such active fraud from passive fraud, in merely refraining from disclosing such alleged prior use, if known to the Computing Company but not known to the Toledo Company. Such so-called passive fraud was alleged by the Toledo Company in 1913 in petitions to the Seventh Circuit Court of Appeals in the case in the Northern District of Illinois. In 1913 and again in 1921 the Circuit Court of Appeals had refused to reopen that case to permit the Toledo Company to show such prior use. This refusal was one of the alleged errors complained of in the Toledo Company's first application to this Court for certiorari.

The Computing Company contends (and the Seventh Circuit Court of Appeals holds) in substance that the fraud now alleged in the bill in the Northern District of Ohio is *not extrinsic* to, but *intrinsic* in, the matters tried in the case in the Seventh Circuit; that it is essentially only the same fraud unsuccessfully set up by the Toledo Company in that case in 1913 and in 1921 and in this Court in January, 1922; that in 1913 the Toledo Company, having procured Phinney scales, alleged prior use by Phinney, previous knowledge thereof by the Computing Company and lack of knowledge by the Toledo Company, and inferentially alleged, or at least should then have discovered, the alleged purchases and suppression of Phinney scales by the Computing Company; that the question of fraud now raised can be raised only by bill of review, and the District Court for the Northern District of Ohio has no jurisdiction to enjoin, for such alleged fraud, the enforcement of the decree in the case in the Seventh Circuit.

The motion for preliminary injunction in the Northern District of Ohio was set for hearing on January 19, 1922. At the time set hearing was had, the Computing Company by counsel opposed the motion and filed an answer, with exhibits, and three affidavits. (Record, pages ~~24-156.~~) On account of other unfinished judicial business the Court adjourned the hearing, continuing the restraining order for ten days. (Record, pages ~~351-352.~~) On January 28, 1922, and again on February 7, 1922, the restraining order was further continued in force, and on February 13, 1922, a preliminary injunction of similar scope was granted. (Record, pages ~~372-376, 379-380, 414-417.~~) After the hearing on January 19, 1922, the Computing Company had filed additional affidavits and a brief. (Record, pages ~~156-171, 211.~~) The answer of the Computing Company recites special appearance to make jurisidictional objections, but sets up every conceivable defence, both on questions of jurisdiction, venue, parties and pleadings and on the merits, including a plea of *res judicata* and detailed response to the several allegations in the bill. The Computing Company denies, but the District Court for the Northern District of Ohio in its preliminary injunction order finds, that the Computing Company "has fully submitted its person and the * * * controversy to the jurisdiction of" that Court. (Record, page ~~415.~~)

On January 20, 1922, after the Computing Company had filed its answer and affidavits and had appeared by counsel at the hearing on January 19, 1922, the Bonding Companies filed their answer (*a*) admitting that by the terms of their bonds they *are unconditionally obligated to pay the Computing Company the amount of its decree* as soon as the mandate from the Circuit Court of Appeals to the District Court shall be issued, and *will, if not restrained, pay the amount with interest,* and (*b*) praying for affirmative relief by interpleader. (Record, pages ~~172-186.~~)

On granting a preliminary injunction the Court filed an opinion covering 26 pages (~~417-444~~) of the Record, citing many authorities and holding in substance (1) that the bill alleges *extrinsic* fraud (*a*) not cognizable by bill of review in the original case in the Northern District of Illinois, but (*b*) cognizable by independent bill elsewhere, and (2) that by answering and filing affidavits to the merits the Computing Company had appeared generally. On March 14, 1922, the Computing Company "not waiving its special appearance" appealed to the *Sixth* Circuit Court of Appeals from the order of February 13, 1922, and filed its 23 assignments of error. The appeal was allowed, but not to operate as a supersedeas. (Record with Toledo Company's petition for prohibition or mandamus submitted in this Court April 13, 1922, pages 445-450.)

Meanwhile on February 10, 1922, the Computing Company filed a petition in the *Seventh* Circuit Court of Appeals setting forth the proceedings in the Northern District of Ohio as exhibits and praying an order (1) against the Toledo Company to show cause why it should not (*a*) be adjudged in contempt by reason of filing the bill and obtaining the restraining orders in the Northern District of Ohio, and (*b*) be enjoined from further proceedings on said bill and restraining orders, and (2) against the Bonding Companies to show cause (*a*) why they should not be enjoined from further proceedings on their petition to interplead, and (*b*) why the mandate of the Seventh Circuit Court of Appeals should not contain a direction to enter summary judgment on the supersedeas bonds. (Record, pages ~~14-28~~.) On the same day the Seventh Circuit Court of Appeals entered an order to show cause pursuant to the prayer of the petition. The petition, among other things, alleged (Record, page 19) that the Bonding Companies, by filing an answer in the Northern District of Ohio and praying an interpleader "showed an understanding" with the Toledo Company to "support" the jurisdiction of the District Court for the Northern District of Ohio and

"to resist liability on the supersedeas bonds"—an inference wholly unfounded in fact and contrary to the nature of interpleader and to the admissions in the answer of the Bonding Companies. [*Supra*, page 7.]

In response to the order to show cause the Bonding Companies, among other things, (*a*) showed that they had at no time resisted liability upon the supersedeas bonds, but on the contrary stand ready to make payment whenever it shall be finally determined that by making payment they will be discharged from liability to the parties involved in the litigation, and (*b*) opposed an order for the entry of summary decree on the supersedeas bonds, since obedience to such an order would be contempt of the District Court for the Northern District of Ohio and *vice versa*. (Record, pages ~~197-201.~~ 473-476.

On March 25, 1922, the Seventh Circuit Court of Appeals filed an opinion covering thirteen pages (~~452-465~~) of the Record and entered an order for the following mandate: 478-488.

"1. Enter of record our affirmance of the final decree on accounting.

"2. Enjoin Toledo Company from further maintaining its Ohio bill and from filing elsewhere any similar bill.

"3. *Enter summary decree against the sureties on the supersedeas bonds for the amount due upon the accounting decree,* including all costs in both courts, but not exceeding the penalties of the bonds * * *."

Toledo Scale Co. vs. Computing Scale Co., 281 Fed. 488, 500; Record, page ~~465~~. 488.

The opinion of the Seventh Circuit Court of Appeals holds, in substance, that the bill alleges *intrinsic* fraud, exclusively cognizable by bill of review in the original case, and says (italics ours):

"In taking up the question we will endeavor to bear in mind throughout that the Ohio bill is not before us on

demurrer, nor is the temporary injunction here on appeal. We have no jurisidiction to entertain a direct attack. *Unless Computing Company's petition can prevail over Toledo Company's response as a collateral attack, our duty would be to dismiss Computing Company's petition for want of jurisdiction.*

"If the Ohio Record, which fully embodies our Record, demonstrates that the material issues there tendered were within the exclusive jurisdiction of this Court, it seems to us that Computing Company's collateral attack should be adjudged successful."

Toledo Scale Co. vs. Computing Scale Co., 281 Fed. 488, 493; Record, page ~~456~~. *481*

Immediately before the passage just quoted, the opinion says (italics ours):

"From the foregoing synopsis of Computing Company's petition and Toledo Company's response it is evident that a conflict of jurisdiction is involved. Of course, the District Court in Ohio would not enjoin Computing Company from proceeding in this Court and the Court below to enforce the accounting decree, unless that Court felt constrained by the rules of law and equity to exercise such a jurisdiction. And likewise this Court would not entertain the present petition and response, if it did not believe that the duty so to do was inevitably cast upon it. In this situation the course, if open, that would seem most consonant with our respect for the District Court in Ohio would be for us to certify the question to the Supreme Court. But inasmuch as *we deem that the ultimate question cannot be answered without considering and weighing the recorded facts in the two Courts*, and inasmuch as *that would require the transmission to the Supreme Court of the entire Record*, we find that the above suggested course is not available.

Graver vs. Faurot, 162 U. S. 435. If, however, our answer is wrong, the question can be presented to the Supreme Court by petition for wrt of certiorari."

Toledo Scale Co. vs. Computing Scale Co., 281 Fed. 488, 492-493; Record, page ~~456~~. 481

On motion of the Bonding Companies, to permit application to and action by this Court, so much of this mandate as directs entry of summary decree against the Bonding Companies was stayed on April 12, 1922. (Record, pages ~~470-471~~.) The Bonding Companies accordingly made application to this Court for the writ of certiorari, which was granted. The Toledo Company also made application for the writ of certiorari to review the same order of March 25, 1922, which application was also granted. No. 388 is the case in this Court on the writ of certiorari granted to the Bonding Companies; No. 339 is the case on the writ granted to the Toledo Company. 494

Both in No. 339 and in No. 388 therefore the same order of March 25, 1922, is now before this Court for review.

ARGUMENT.

The result to the Bonding Companies of the order of the Seventh Circuit Court of Appeals of March 25, 1922, is this:

The Bonding Companies have no interest in the merits of the litigations between the Computing Company and the Toledo Company. By their bonds they are obligated to pay $500,000. They desire to discharge their obligation in full by payment—once but not twice. The Seventh Circuit Court of Appeals directs the District Court for the Northern District of Illinois to order the Bonding Companies to pay. The District Court for the Northern District of Ohio however had already ordered the Bonding Companies *not* to pay and the Banks *not* to cash the Bonding Companies' collateral with

which to make such payment. The District Court for the Northern District of Illinois and the District Court for the Northern District of Ohio are Courts of independent coordinate jurisdiction. Each has full jurisdiction over the persons and the property of the Bonding Companies—and also of the Computing Company and the Toledo Company. One orders the Bonding Companies to pay after the other had ordered them not to pay. Obedience by the Bonding Companies to either Court would be contempt of the other. Payment by the Bonding Companies would involve risk of paying the same $500,000 twice—would enlarge the obligation of the Bonding Companies from that of sureties for the Toledo Company to the Computing Company into that of sureties for both the Toledo Company and the Computing Company to each other. In short, obedience by the Bonding Companies to the order of March 25, 1922, would make the Bonding Companies universal underwriters of the entire litigation between the Toledo Company and the Computing Company,—guarantors of payment or repayment by the ultimate loser to the ultimate winner whichever the ultimate winner may be.

This case, therefore, so far as the Bonding Companies are concerned, *is not a controversy between litigants but a controversy between United States Courts.* The Seventh Circuit Court of Appeals and the District Court for the Northern District of Ohio are in dispute as to whether or not the Bonding Companies should pay. The Bonding Companies cannot obey both Courts and cannot safely disobey either. They have no jurisdiction to decide this controversy between contending United States Courts.

This collision between orders by these contending United States Courts has resulted directly from the action of the Seventh Circuit Court of Appeals in "enjoining an injunction," already obtained against the enforcement of its own previous decree, and ordering enforcement of such previous

decree, even against sureties not responsible for the Ohio injunction, in spite of the fact—

(1) that the District Court for the Northern District of Ohio unquestionably has full jurisdiction over the persons and the property of the Bonding Companies, as well as the persons and the property of the Toledo Company and the Computing Company, including jurisdiction *in a proper case* to enjoin enforcement of a decree of another Court, state or federal;

(2) that the District Court for the Northern District of Ohio *had already exercised this jurisdiction by deciding,* after hearing the Computing Company in opposition and after further consideration, that *the case before it was a proper case* for such injunction, and by enjoining accordingly the enforcement of the decree in the Northern District of Illinois and also enjoining payment by the sureties on the supersedeas bonds and payment to the sureties of their collateral;

(3) that in so enjoining the sureties on the supersedeas bonds the District Court for the Northern District of Ohio was the first Court to make any order or decree against the sureties in these litigations;

(4) that, as the Seventh Circuit Court of Appeals in effect states in its opinion, the ultimate question whether or not the District Court for the Northern District of Ohio was right in so deciding depends upon consideration of the entire records, covering thousands of pages, of the case in the Seventh Circuit Court of Appeals and the case in the District Court for the Northern District of Ohio;

(5) that to review this decision of the District Court for the Northern District of Ohio the Seventh Circuit Court of Appeals has no jurisdiction, but the *Sixth* Circuit Court of Appeals has jurisdiction and presumably is quite as able and willing to do justice as the Seventh Circuit Court of Appeals; and

(6) that this appellate jurisdiction of the *Sixth* Circuit Court of Appeals had already been invoked by the Computing Company before the Seventh Circuit Court of Appeals passed the order now in question.

I.

The Seventh Circuit Court of Appeals, in Ordering Summary Decree Against the Bonding Companies After the District Court in Ohio Had Enjoined the Bonding Companies From Paying Such a Decree, Exceeded Its Jurisdiction.

In granting the preliminary injunction against the enforcement of the decree in the case in the Seventh Circuit, and against payment by the sureties on the supersedeas bonds, the District Court for the Northern District of Ohio held, among other things, (1) that the bill alleges extrinsic fraud cognizable by independent bill in equity in the District Court for the Northern District of Ohio, (2) that by answering and filing affidavits to the merits the Computing Company had appeared generally and submitted to the jurisdiction and (3) that a proper case for preliminary injunction had been shown. [*Supra,* page 8.] Whether the decision of the District Court in so holding is free from error is not for the Bonding Companies to say. This decision of the District Court can be reviewed by the *Sixth* Circuit Court of Appeals on the now pending appeal of the Computing Company from the order granting the preliminary injunction. The decision of the District Court can also *ultimately* be reviewed by this Court, on certiorari to the *Sixth* Circuit Court of Appeals or on direct appeal from a final decree in the District Court on the question of jurisdiction.

The Seventh Circuit Court of Appeals has no appellate jurisdiction over the District Court for the Northern Dis-

trict of Ohio and no authority to review or correct errors in an order of that District Court. In this case the Seventh Circuit Court of Appeals does not profess to review or correct errors in the order of the District Court for the Northern District of Ohio. It does, however, assert the right to treat that order as a nullity. On this asserted right to treat the order as a nullity, the action of the Seventh Circuit Court of Appeals is based.

The nature of the action of the Circuit Court of Appeals in this respect is made clear in its opinion:

> "In taking up the question we will endeavor to bear in mind throughout that the Ohio bill is not before us on demurrer, nor is the temporary injunction here on appeal. We have no jurisdiction to entertain a direct attack. *Unless Computing Company's petition can prevail over Toledo Company's response as a collateral attack, our duty would be to dismiss Computing Company's petition for want of jurisdiction.*
>
> "If the Ohio Record, which fully embodies our Record, demonstrates that the material issues there tendered were within the exclusive jurisdiction of this Court, it seems to us that Computing Company's collateral attack should be adjudged successful." (Italics ours.)
>
> *Toledo Scale Co. vs. Computing Scale Co.*, 281 Fed. 488, 493; Record, page 456.

In thus treating the order of the District Court for the Northern District of Ohio as a nullity, the Seventh Circuit Court of Appeals exceeded its authority and jurisdiction. The District Court for the Northern District of Ohio unquestionably had jurisdiction over the persons of the Computing Company and of the Bonding Companies. Furthermore, it has decided (1) that the Computing Company had entered a general appearance and submitted to its jurisdiction. It has also decided (2) that the bill states a case of extrinsic fraud cognizable by it. In so deciding either or

both of these questions, the District Court may have been in error. Its decision, however, even if erroneous, cannot be treated as a nullity.

> "The District Court obviously had jurisdiction to determine, in the first instance, whether the Rock Island had entered a general appearance. *Jones vs. Andrews,* 10 Wall. 327. It had jurisdiction also to determine whether the relief sought in the Toledo Companys' cross bill was in its nature germane to the proceedings theretofore instituted in the suit by the bondholders' committee or by the Central Trust Company, so that the rights asserted in the cross bill could be properly litigated in that suit. *Chicago, Milwaukee & St. Paul Ry. Co. vs. Third National Bank of Chicago,* 134 U. S. 276, 287. And finally, it had jurisdiction to determine whether the fact that such earlier proceeding had been instituted on behalf of the Rock Island, that it had actively participated in the conduct thereof, and to that end had entered a general appearance, made it subject to the further proceedings thereon by way of cross bill, as fully as if the earlier action had been taken in its name as well as on its behalf. Compare also *Ex parte Gordon,* 104 U. S. 515; *Globe Refining Co. vs. Landa Cotton Oil Co.,* 190 U. S. 540; *In re Pollitz,* 206 U. S. 323. If in the judgment of the Rock Island the District Court erred in the decision of any one or all of these questions it will have its remedy by appeal, unless it has failed to preserve by appropriate procedure that right of review."
>
> *Ex parte Chicago, R. I. & P. Ry.,* 255 U. S. 273, 279-280.

In *In re Metropolitan Trust Co.,* 218 U. S. 312, there had been a removal from a state Court to the federal Court on the ground of separable controversy and a motion to remand had been denied. Later, on demurrer, the bill was

dismissed as against one defendant. Still later, the bill was dismissed as against the other defendants. No appeal was taken from the first decree of dismissal, but the second decree was reversed on appeal by the Circuit Court of Appeals with directions to remand to the state Court. Thereupon, the Circuit Court undertook to vacate the final decree of dismissal from which no appeal had been taken, for the reason that the decision of the Circuit Court of Appeals on the appeal from the later decree determined that there was no separable controversy, and that, therefore, the motion to remand should have been granted in the first instance. On application to this Court for mandamus to the Circuit Court, it was held that, in thus treating the decree of dismissal as a nullity, the Circuit Court had exceeded its jurisdiction.

> "To reach this result the Circuit Court asserted the power to vacate the decree upon the ground that it had been rendered without jurisdiction; and *the Court held that it must be treated as a nullity.* But the decree cannot be so regarded unless the Court, upon the motion to remand was without jurisdiction to determine whether a separable controversy existed, and hence not merely committed error but exceeded its authority. The decree was not a nullity unless the order refusing to remand was a nullity; and the latter contention was negatived by the decision of this Court upon the application for a writ of mandamus in *In re Pollitz, supra.* The reversal by the Circuit Court of Appeals of the final decree as to the other defendants, and its direction to remand, did not make the decision of the Court of first instance any the less '*a judicial act,* and within the scope of its jurisdiction and discretion'; and as that reversal and direction did not affect the Trust Company the decree in its favor remained in full force." (Italics ours.)
>
> 218 U. S. 321.

Whether erroneous or not, the decision of the District Court for the Northern District of Ohio in this case was "a judicial act." Certainly it was no less "a judicial act" than is a decision on the question whether or not a separable controversy exists. This action of the District Court required consideration of voluminous facts and difficult questions of law. As is stated in the opinion of the Seventh Circuit Court of Appeals, this question of jurisdiction "cannot be answered without considering and weighing the recorded facts in the two Courts." (*Toledo Scale Co. vs. Computing Scale Co.*, 281 Fed. 488, 492; Record, page 456.) These "recorded facts" cover thousands of pages.

The legal question involved as to the difference between *extrinsic* fraud and *intrinsic* fraud is so complicated that over twenty-five years ago the Seventh Circuit Court of Appeals itself asked this Court to resolve what the Circuit Court of Appeals deemed an irreconciliable conflict between two decisions of this Court on this very question. (*Graver vs. Faurot*, 162 U. S. 435.) As this Court then declined to pass upon this supposed conflict, and has not since done so, the "judicial act" of distinguishing between extrinsic and intrinsic fraud seems at least as difficult and substantial as it was twenty-five years ago.

In *Graver vs. Faurot*, 162 U. S. 435, a bill was filed in Illinois to impeach for fraud a decree in equity. The United States Circuit Court sustained a demurrer to the bill. The complainant appealed to the Seventh Circuit Court of Appeals. The Seventh Circuit Court of Appeals ordered that a statement of facts and a question be certified to this Court. In the certificate the bill was set forth, together with a demurrer thereto, the decree of the Circuit Court sustaining the demurrer and dismissing the bill and the opinion of the Circuit Court. The certificate then proceeded thus:

> "In view of the decisions of the Supreme Court of the United States in the cases of *United States vs. Throckmorton*, 98 U. S. 61, and *Marshall vs. Holmes*, 141 U. S.

589, this Court is in doubt touching the case in hand, and desires advice and instruction upon the following question: Whether (assuming the bill of complaint to be in other respects sufficient) the alleged false swearing and perjury in the respective answers of defendants in the original suit in the Superior Court of the County of Cook, State of Illinois, are, in the law, available in this suit as ground for a decree setting aside and declaring void the decree so rendered in the Superior Court of the County of Cook?"

162 U. S. 435-436.

This Court in the course of its opinion said:

"It appears from the opinion of the Circuit Court, sent up as part of the certificate and reported in 64 Fed. Rep. 241, that that Court was impressed with the conviction that the complainant had been defrauded, but that the Court could see no way to accord relief under the decision in *United States vs. Throckmorton,* 98 U. S. 61, although the result might be different if the decision in *Marshall vs. Holmes,* 141 U. S. 589, were followed. In other words, the Circuit Court indicated that it could have proceeded without difficulty on the principles expounded in either case if the other were out of the way. Finding it impossible to reconcile these cases, or to make a definitive choice between them, because *United States vs. Throckmorton* was cited without disapproval in *Marshall vs. Holmes,* the Circuit Court sustained the demurrer *pro forma,* and the case was transferred to the Circuit Court of Appeals. But when this had been accomplished the Court of Appeals apparently found itself in a similar quandary, and this resulted in the certificate under consideration.

"* * * In any view we should be compelled, in answering, to analyze the facts charged, in order to determine whether in legal effect they raise the question in-

volved in *Marshall vs. Holmes* or that involved in *United States vs. Throckmorton,* assuming that the legal effect of the facts in those two cases were not the same; or, if it were, to determine whether the facts set up here fall within the same category, and direct which decision should govern.

"This practically requires us to pass upon the whole case as it stands, and to decide whether the demurrer was properly sustained or not.

"But the whole case is not before us for decision, and the certificate discloses that the doubt of the Courts below is based on the assumption that this Court has applied well-settled general principles of law differently in two different cases upon the same state of facts. While some hesitation in decision may temporarily result until it is finally determined whether that assumption is justified, and, if justified, the anomaly is corrected, we think such determination ought not to be attempted save where the point must be disposed of on a record after final decree.

"In the absence of power to deal with the whole case, the question amounts to no more than an inquiry as to whether in our opinion there is an irreconcilable conflict between two or our previous judgments, and a request, if we hold that to be so, that we put an end to that conflict. We do not regard these as questions or propositions of law in a particular case on which we are required to give instruction."

162 U. S. 436, 437-438.

The later cases in this Court and the most recent cases in lower federal Courts likewise illustrate the difficulty and the substantial character of the "judicial act" of distinguishing between *extrinsic* and *intrinsic* fraud. (*Chicago, R. I. & P. Ry. Co. vs. Callicotte,* 267 Fed. 799, 806.) Such a question is a question, both of fact and of law, which cannot be an-

swered (1) "without considering and weighing all the recorded facts," or (2) without distinguishing between decisions of this Court which the Seventh Circuit Court of Appeals at one time at least deemed to be in irreconcilable conflict.

In *Louis. & Nash. R. R. vs. Western Un. Tel. Co.,* 250 U. S. 363, an injunction by one federal court forbidding a railroad company to interrupt a telegraph company in the use of its wires on the railroad right of way was held by this Court binding on a federal court of another circuit. The injunction in question had been granted by a federal court in Kentucky, affected property in Mississippi and was held binding on the federal court in Mississippi. The case in Mississippi arose on a bill filed in the federal court by the railroad company seeking a decree that state judgments of condemnation giving the telegraph company the right to erect its poles along the railroad's right of way in Mississippi were void. Against a supplemental bill the telegraph company set up the injunction in its favor granted by the federal court in Kentucky. This Court in its opinion said:

> "* * * the railroad filed a supplemental bill alleging that the telegraph company had no longer any rights except under the condemnation proceedings but that it still was using its old line. The telegraph company pleaded in reply an injunction, mentioned above, granted by another Court of the United States, forbidding the railroad to interrupt the telegraph in the use of its wires upon the railroad's right of way, the declared purpose being to preserve the *status quo* for a certain time, or until the condemnation could be carried out. 207 Fed. Rep. 1, 5. If for any reason the supplemental bill does not fall with the bill this earlier action in the Sixth Circuit (while it stands, see 252 Fed. Rep. 29) properly was regarded as precluding contrary action in the Fifth."
>
> 250 U. S. 368.

That an earlier injunction by a federal court in one circuit *ought* to preclude a later contrary injunction in another circuit seems too obvious for prolonged discussion. Nothing could be more certainly calculated to disturb the orderly administration of justice and to bring United States Courts generally into disrepute than the fulmination, by contending United States Courts of co-ordinate jurisdiction, of contradictory orders, injunctions, "counter-injunctions" and "injunctions against injunctions." Courts are constituted to decide controversies between litigants, not to engage in controversies among themselves and compel litigants at *their* peril to decide such controversies.

II.

The Ultimate Merits of This Controversy Between United States Courts, i. e., The Merits of the Ohio Litigation Between the Toledo Company and the Computing Company, Are Not Now Before This Court for Determination.

Both parties in No. 339—the Toledo Company and the Computing Company—will doubtless feel called upon in this Court to justify themselves concerning the ultimate merits of the Ohio litigation between them—which has developed into a controversy betwen the District Court in Ohio and the Seventh Circuit Court of Appeals. The Bonding Companies, however, do not feel called upon to enter upon any discussion of the ultimate merits of this Ohio litigation. On the contrary, the position of the Bonding Companies is that *in this case* the merits of the Ohio litigation are not before this Court at all for consideration—for the reason that they were not *properly* before the *Seventh* Circuit Court of Appeals. If the District Court in Ohio was right on the merits of the Ohio litigation, then of course the Seventh Circuit Court of

Appeals was wrong in reaching directly the opposite question. If, however, the District Court in Ohio was wrong on the merits, then the Seventh Circuit Court of Appeals nevertheless erred in ordering disobedience of an order of the District Court in Ohio and in usurping in effect (though disclaiming such usurpation in words) the jurisdiction of the *Sixth* Circuit Court of Appeals to review and correct any error in the order of the District Court in Ohio. In either event, therefore, the merits of the Ohio litigation are not before this Court for determination in this case.

The material circumstance now is that the merits of the Ohio case depend upon complex questions of law and fact, that the District Court in Ohio had jurisdiction over the parties and jurisdiction to decide such questions of law and fact and that that Court has exercised this jurisdiction by deciding, after due consideration, these very questions of law and fact. If the decision of the District Court in Ohio was erroneous it can be corrected in due course by the *Sixth* Circuit Court of Appeals or *ultimately* by this Court, *but not in this case*. If the decision of the District Court in Ohio was right, then there is no occasion to correct or change it. In either event it is unnecessary *in this case* for this Court to consider the voluminous facts or the difficult questions of law which might be involved in a decision on the merits of the Ohio case.

III.

The Action of the Seventh Circuit Court of Appeals is Reviewable in This Court by Certiorari.

(*a*) As this case was a "case arising under the patent laws," it is, therefore, "a case in which the decree of the Circuit Court of Appeals is made final" by the provisions of Section 128 of the Judicial Code. It is, therefore, review-

able by certiorari under Section 240 of the Judicial Code. This case is none the less "a case arising under the patent laws" because in the course of the case the Circuit Court of Appeals has taken action which is beyond its jurisdiction. Whether a case is reviewable by certiorari under Section 240 depends upon "the source of original jurisdiction of the trial Court," not upon what occurs in the progress of the case.

> "We held in *Macfadden vs. United States,* 213 U. S. 288, that the line of division between cases appealable from the Circuit Court of Appeals and those made final in that Court was determined by the source of original jurisdiction of the trial Court, and not by the nature of the questions of law raised or decided.
>
> In our view the petition filed in the Circuit Court of Appeals was ancillary to the original jurisdiction invoked, and was still in its essence and nature a suit involving the validity of a patent, which is expressly made final in the Circuit Court of Appeals, subject to the right of this Court to review by writ of certiorari."
>
> *National Brake Co. vs. Christensen,* 254 U. S. 425, 432-433.

(*b*) A writ of certiorari may also be granted under the provisions of Section 262 of the Judicial Code "as a means of correcting excesses of jurisdiction, of giving full force and effect to existing appellate authority, and of furthering justice in other kindred ways."

United States vs. Beatty, 232 U. S. 463, 467;
Spiller vs. Atchison, T. & S. F. Ry. Co., 253 U. S. 117, 121-122;
Union Pac. R. R. vs. Weld County, 247 U. S. 282, 284;
McClellan vs. Carland, 217 U. S. 268, 277-279.

In this case the Seventh Circuit Court of Appeals in treating the order of the District Court for the Northern District

of Ohio as a nullity, not only exceeded its own jurisdiction but in so doing interfered with the existing appellate jurisdiction of the *Sixth* Circuit Court of Appeals, and *of this Court,* to review the action of the District Court for the Northern District of Ohio. In this aspect, therefore, this case may be reviewed on certiorari under Section 262.

Cf. McClellan vs. Carland, 217 U. S. 268, 280.

It is respectfully submitted that the order of the Seventh Circuit Court of Appeals of March 25, 1922, directing entry of summary decree against the Bonding Companies should be reversed with costs.

EDWARD OSGOOD BROWN,

EDWIN J. MARSHALL,

CHARLES MARKELL,

Counsel for Fidelity and Deposit Co. of Maryland and United States Fidelity and Guaranty Co., Petitioners in No. 388.

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WM. R. STANS
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 388

FIDELITY AND DEPOSIT COMPANY OF MARYLAND, AND UNITED STATES FIDELITY AND GUARANTY COMPANY,

Petitioners,

vs.

THE COMPUTING SCALE COMPANY, AND TOLEDO SCALE COMPANY,

Respondents.

BRIEF OF THE COMPUTING SCALE COMPANY, RESPONDENT.

JOHN M. ZANE,
CHARLES F. MORSE,
DRURY W. COOPER,
Counsel for Respondent, The Computing Scale Company.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

IN THE

Supreme Court of the United States.

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vs.

THE COMPUTING SCALE COMPANY, AND TOLEDO SCALE COMPANY,

Respondents.

BRIEF OF THE COMPUTING SCALE COMPANY, RESPONDENT.

This case involves that part of an order entered by the United States Circuit Court of Appeals for the Seventh Circuit on March 25, 1922, which directed the United States District Court for the Northern District of Illinois, Eastern Division, to enter a summary decree against the petitioners, hereinafter called the Bonding Companies, on certain supersedeas bonds. (Printed Rec., 478, 488.) Other parts of the order are before this court for review on certiorari on the petition of Toledo Scale Company. The principal facts in the controversy

are set forth in our brief in the last mentioned case, No. 339, at this term. We will here briefly refer to the facts necessary for a disposition of this case.

On March 5, 1919, after a litigation lasting over nine years, the District Court of the United States for the Northern District of Illinois, Eastern Division, entered a decree in a patent infringement suit in which The Computing Scale Company was plaintiff and Toledo Scale Company was defendant in favor of the plaintiff in the sum of $420,883.44. (Printed Rec., 2860.) Toledo Scale Company appealed from the decree to the United States Circuit Court of Appeals for the Seventh Circuit, and to obtain a supersedeas of the decree executed its supersedeas bond in the sum of $450,000 with the Bonding Companies as sureties. (Printed Rec., 2872.) This bond was duly approved and filed in the District Court. (Printed Rec., 2874.) Thereafter the case was heard on appeal by the Circuit Court of Appeals, and on October 4, 1921, the decree of the District Court was affirmed. (Printed Rec., red paging, 3311.) On motion of Toledo Scale Company the mandate of the Court of Appeals was stayed until the further order of the Court to enable Toledo Scale Company to apply to this Court for a writ of certiorari. As a condition to the granting of this stay an additional stay bond in the sum of $50,000 was filed in the Court of Appeals by Toledo Scale Company, with Fidelity and Deposit Company of Maryland, one of the Bonding Companies, as surety. (Printed Rec., red paging, 3312.) The petition for certiorari was presented to this Court January 3, 1922, and on January 9, 1922, was denied. (257 U. S. 657.)

On the same day that the petition for certiorari was denied the Toledo Scale Company filed its bill of complaint in the District Court of the United States for the

Northern District of Ohio, Western Division, to enjoin The Computing Scale Company from enforcing its final decree affirmed by the Circuit Court of Appeals for the Seventh Circuit, and to enjoin the Bonding Companies on the supersedeas and stay bonds from making payment on said bonds and to cancel those bonds. The allegations of the bill and its obvious lack of merit are discussed in our brief in case No. 339, at this term, and will not be here repeated.

The bill plainly showed that Toledo Scale Company was a resident of the State of New Jersey, that the Bonding Companies were residents of the State of Maryland, and that The Computing Scale Company was a resident of the Southern Judicial District of the State of Ohio, and that the only parties resident in the district in which the suit was brought were certain Toledo and Cleveland banks. (Printed Rec., 13, 33, 37.) The bill attempted to justify the jurisdiction of that particular District Court by alleging that in order to obtain the Bonding Companies as sureties upon its supersedeas bond of $450,000 given in the Illinois District Court, the Toledo Scale Company had given the Bonding Companies certified checks for $455,000 drawn on the bank defendants. (Printed Rec., 29.) The bill further alleged that the Bonding Companies had cashed these certified checks and deposited the proceeds in the banks on which the checks were drawn and obtained *unconditional* certificates of deposit in like amounts. It was also stated that when the additional stay bond was executed it was agreed between Toledo Scale Company and the Bonding Companies that the accumulated interest on the certificates of deposit should be the security of the Bonding Companies for the execution of the additional stay bond. The bill as originally drawn stopped here and on the strength of this

showing it was urged that the Toledo court had jurisdiction. The bill included a prayer to enjoin the banks which had issued the certificates of deposit from paying the surety companies. (Printed Rec., 31, 32.) A temporary restraining order, without notice, was prayed and granted in accordance with the prayer of the bill, United States Fidelity and Guaranty Company, one of the bonding companies, acting as surety. (Printed Rec., 41-43.)

Realizing the insufficiency of the allegations, by amendment it was alleged that in order to furnish the Bonding Companies with the original security of certified checks Toledo Scale Company had borrowed the amount of the certified checks from the bank defendants, and as security for the loan and for other loans of $395,000 it had given notes and pledged its bills receivable and securities in the total sum of $705,000. The amended bill added a prayer that the bank defendants be enjoined from enforcing the notes.

There is nothing alleged to connect the Bonding Companies with the collateral desposited in the Toledo banks, and it must be plain that the Bonding Companies have no interest in that collateral. It belongs to the Toledo banks to secure them on other loans as well as the loan made to enable Toledo Scale Company to furnish security to the Bonding Companies. It is plain also that the banks owe the holders of the certificates of deposit, the Bonding Companies, the money represented thereby. These certificates of deposit are admitted to be unconditional. The bill does not allege any agreement whereby the Bonding Companies agreed to hold the particular funds intact or to deposit them in particular banks, and while the money can be physically traced there is no legal principle by which it can be said that Toledo

Scale Company has any more of an equity in these particular funds than in any other funds of the Bonding Companies. Of course it is apparent that The Computing Scale Company has no interest either in the certificates of deposit of the Bonding Companies or in the collateral of the banks.

The Computing Scale Company appeared in the Ohio Court by special appearance and pleaded, preserving its special appearance throughout its pleading. (1) lack of jurisdiction of the person of The Computing Scale Company and colorable joinder of the banks as defendants to confer jurisdiction, (2) lack of jurisdiction of the subject matter, (3) insufficiency of the bill of complaint, (4) laches in applying for relief, (5) *res judicata* of the issue presented by the bill, (6) an answer denying the alleged facts. (Printed Rec., 126.) This pleading showed the Bonding Companies that The Computing Scale Company intended to resist the effort to remove the litigation from the United States Circuit Court of Appeals for the Seventh Circuit, where it was still pending, to the District Court in Ohio. It also informed the Bonding Companies that the Ohio Court in which the suit was brought had no jurisdiction of the person of the defendant, The Computing Scale Company or of the defendants, the Bonding Companies; that the Ohio Court had no jurisdiction of the subject matter; and that the matters involved had already been adjudicated by the proceedings in the United States Circuit Court of Appeals for the Seventh Circuit.

In spite of this warning and in spite of the fact that by having become parties to the litigation in the United States Circuit Court of Appeals for the Seventh Circuit they were charged with full knowledge of what had taken place in that litigation, the Bonding Companies, pursu-

ing the collusive plan of Toledo Scale Company to confer jurisdiction on the Ohio District Court, filed an answer to the bill of complaint and a cross petition in the nature of a bill of interpleader in which they attempted to confer jurisdiction on the Ohio Court by alleging that the suit was one affecting liens on collateral in the jurisdiction of the Ohio Court, and alleging that they had a lien on such property and that The Computing Scale Company asserted a lien on such property. (Printed Rec., 101, 105.) Of course The Computing Scale Company claimed no lien on the collateral, and in law could claim no lien; and the matters pleaded by Toledo Scale Company do not show that the Bonding Companies had any right to claim a lien on the collateral. The Bonding Companies made no resistance to any of the restraining orders, one of them acted as surety on the bond given to obtain the original restraining order, they voluntarily submitted to the jurisdiction of the Ohio Court and attempted to confer jurisdiction on that Court.

The fact further appears that counsel for the Bonding Companies, Marshall & Fraser, were counsel of record for the bank defendants, and that the co-counsel for some of the bank defendants, Rathbun Fuller, was also counsel of record for the Toledo Scale Company, although, if the bill of complaint and the petition of the Bonding Companies had any merit, the interests of these parties would be adverse.

The Bonding Companies did not resist the granting of the injunction on February 13, 1922, by the District Court in Ohio, although prior to that time they had been served with notice of the filing of a petition by The Computing Scale Company on February 10, 1922, presenting the record of the proceedings in the Ohio

Court to the United States Circuit Court of Appeals for the Seventh Circuit, requesting an injunction against the maintenance of these proceedings, and requesting that a summary decree be entered against the Bonding Companies on the supersedeas and stay bonds. (Printed Rec., 1.) The Bonding Companies made no effort to rescue themselves from the predicament caused by the granting of the temporary injunction by appeal to the United States Circuit Court of Appeals for the Sixth Circuit from the injunction or by motion to dissolve. The Computing Scale Company appealed and invited the Bonding Companies to join in the appeal, but they refused and an order of severance had to be made.

This petition filed in the United States Circuit Court of Appeals for the Seventh Circuit on February 10, 1922, fully set forth the record of the proceedings in the Ohio District Court and showed that the proceedings in Ohio constituted a vexatious suit and an effort to relitigate matters adjudicated by the United States Circuit Court of Appeals for the Seventh Circuit; that the Ohio Court had no jurisdiction of either the person of The Computing Scale Company or the subject matter of the suit, and that the Bonding Companies had voluntarily subjected themselves to the jurisdiction of the Ohio Court and were acting in collusion with Toledo Scale Company.

The Bonding Companies answered the petition, setting forth some of the contentions which they now make, and claimed that the United States Circuit Court of Appeals for the Seventh Circuit had no right to order a summary judgment to be entered against them on the supersedeas and stay bonds as such an order would be a violation of their constitutional rights to a jury trial. On March 25, 1922, the Circuit Court of Appeals entered

its order for a mandate directing the District Court for the Northern District of Illinois to enjoin Toledo Scale Company from further maintaining its Ohio bill and to enter a summary judgment against the Bonding Companies to enforce their liability on the supersedeas and stay bonds.

The brief of the Bonding Companies ignores these fundamental facts:

(1) That the United States Circuit Court of Appeals for the Seventh Circuit and the United States District Court for the Northern District of Illinois had exclusive jurisdiction of the supersedeas and stay bonds given in this cause, and that the said bonds were in the custody of these courts, and that therefore the Ohio District Court would be without power to cancel the bonds as prayed in the bill of complaint there filed;

(2) That the United States Circuit Court of Appeals for the Seventh Circuit and the District Court for the Northern District of Illinois acquired personal jurisdiction over the Bonding Companies when the supersedeas and stay bonds were filed;

(3) That the predicament which the Bonding Companies now claim to exist was caused, not by the action of the Circuit Court of Appeals for the Seventh Circuit, but by the action of the District Court of the United States for the Northern District of Ohio, and that the Bonding Companies could have avoided this predicament by refusing to acquiesce in the jurisdiction of that District Court, instead of endeavoring to confer jurisdiction on that Court.

The Bonding Companies cannot be heard to say that they are in the position of an innocent bystander entitled to be protected from injuries which might result to them from a contest carried on by others. By executing the supersedeas and stay bonds as sureties, the Bonding Companies, as this Court has said, "become parties to the proceedings and subject themselves to

the jurisdiction of the Court so that summary judgment may be rendered on their bonds." *Babbitt* v. *Finn*, 101 U. S. 7; *Pease* v. *Rathbun-Jones Engineering Co.* 243 U. S. 273. The last named case should settle for all time the power of a court of equity, disposing of litigation, to enter a summary decree against sureties on supersedeas and cost bonds. In that case this Court said, citing in the margin many cases to support its statement:

> "A court of equity having jurisdiction of the principal case will completely dispose of its incidents and put an end to further litigation. Applying this principle, equity courts, upon the dissolution of an injunction, commonly render a summary decree on injunction bonds."

Having become parties to the litigation before the United States Circuit Court of Appeals for the Seventh Circuit, the Bonding Companies subjected themselves to the possibility of having a summary judgment rendered against them on the affirmance of the decree in which their bonds had been given. The Bonding Companies seem to argue that they had the power to deprive the Circuit Court of Appeals of its jurisdiction to enter a summary decree against them, by the simple expedient of assenting to an attempted exercise of jurisdiction by another court.

The Ohio banks were not necessary parties in the sense that they could defeat jurisdiction, for in that event they being adverse in interest to The Computing Scale Company, the Ohio court would have had no jurisdiction, since the necessary diverse citizenship between The Computing Scale Company and the Ohio banks did not exist. Nor were they even proper parties.

The Bonding Companies rely on the cases of *Ex parte Chicago, Rock Island & Pacific Ry. Co.* 255 U. S. 273,

and *In re Metropolitan Trust Co.* 218 U. S. 312, and other cases, as showing that the Circuit Court of Appeals had no authority to treat the order of the Ohio Court as a nullity. The materiality of the cases for the purpose is not apparent. If anything they show that the Ohio District Court should not have disregarded the previous rulings of the Circuit Court of Appeals for the Seventh Circuit as to the merits of the bill of Toledo Scale Company. The Circuit Court of Appeals in this case did no more than was done by the Courts in *Kessler* v. *Eldred*, 206 U. S. 285 and *Supreme Tribe of Ben Hur* v. *Cauble*, 255 U. S. 356, to protect their prior acquired jurisdiction over matters and persons before them.

The brief of the Bonding Companies makes certain contentions which we cannot allow to pass unmentioned:

1. The argument is frequently made that the Bonding Companies are ready and willing to pay once, but that they are in danger of being compelled to pay the same money twice. This is absurd. The only party to whom they can be compelled to pay money is The Computing Scale Company.
2. It is argued that the Circuit Court of Appeals for the Seventh Circuit has endeavored to review the decision of the District Court for the Northern District of Ohio. The Court expressly states that that decision is not before it for review. All that the Circuit Court of Appeals does is to decide that nothing has happened to deprive it of the power to enforce its decree still pending before it.
3. Stress is laid on the size of the record in the case as justifying the Ohio Court in determining in the first instance its own jurisdiction. We cannot see that this has anything to do with the case, and of course the size of the record is immaterial.

In conclusion we wish to call the attention of the Court to the fact that the Bonding Companies have no independent interest in the outcome of this controversy. They have elected to follow

the fortunes of Toledo Scale Company. The power of the Circuit Court of Appeals to enjoin Toledo Scale Company from maintaining its Ohio bill must carry with it the power to terminate the entire litigation and to enforce its decree. Nor will any hardship result to the Bonding Companies from an affirmance in both cases. It must be assumed that the Ohio District Court would on motion dissolve its injunction as to the Bonding Companies and that the Circuit Court of Appeals for the Sixth Circuit would reverse the order of the District Court enjoining The Computing Scale Company. If there is any risk involved, the Bonding Companies created it by their own conduct and cannot now complain.

Respectfully submitted,

JOHN M. ZANE,
CHARLES F. MORSE,
DRURY W. COOPER,
Counsel for Respondent, The Computing Scale Company.

IN THE

Supreme Court of the United States

October Term, 1922

No. 339

TOLEDO SCALE COMPANY,

Petitioner,

vs

THE COMPUTING SCALE COMPANY.

No. 388

FIDELITY & DEPOSIT COMPANY OF MARYLAND AND UNITED STATES FIDELITY & GUARANTY COMPANY,

Petitioners,

vs

THE COMPUTING SCALE COMPANY AND TOLEDO SCALE COMPANY.

BRIEF FOR TOLEDO SCALE COMPANY

FREDERICK P. FISH
EDWARD RECTOR
HARRY W. MORGAN
GEORGE D. WELLES,
Solicitors for Toledo Scale Company.

THOS. H. TRACY
RATHBUN FULLER
HORACE KENT TENNEY
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1922

No. 339

TOLEDO SCALE COMPANY,

Petitioner,

vs

THE COMPUTING SCALE COMPANY.

No. 388

FIDELITY & DEPOSIT COMPANY OF MARYLAND AND UNITED STATES FIDELITY & GUARANTY COMPANY,

Petitioners,

vs

THE COMPUTING SCALE COMPANY AND TOLEDO SCALE COMPANY.

BRIEF FOR TOLEDO SCALE COMPANY

STATEMENT OF THE CASE

This cause is here on writs of certiorari issued to the Circuit Court of Appeals for the Seventh Circuit. The Computing Scale Company, hereinafter

called Computing Company, obtained a decree in the District Court for the Northern District of Illinois, Eastern Division, against Toledo Scale Company, then named Toledo Computing Scale Company, and hereinafter called Toledo Company, for money in the sum of $420,883.44, with interest, as the profits found to have been derived by Toledo Company from its use of an improvement in automatic computing scales, which that court and the Circuit Court of Appeals for the Seventh Circuit had held infringed a patent (Smith Reissue No. 11536) owned by the Computing Company. This money decree was affirmed by the Circuit Court of Appeals of the Seventh Circuit and certiorari was denied by this court on January 9, 1922 (Record p. 28).

On January 9, 1922 Toledo Scale Company filed a bill in the United States District Court for the Northern District of Ohio (Record p. 13), alleging that the money decree obtained by the Computing Company against it, as well as the prior decree holding that Toledo Company had infringed the patent, had been obtained by extrinsic fraud of the Computing Company, and that the Toledo Company had first discovered the fraud December 20, 1921.

The jurisdiction of the District Court as a Federal court was based upon diversity of citizenship. The suit was filed in the Northern District of Ohio because of the fact that a number of the defendants, referred to herein as the Bank defendants, were citizens and

residents of the Northern District of Ohio, Western Division (Record p. 13).

The Toledo Company is a New Jersey corporation; The Computing Company is an Ohio corporation and a citizen and resident of the Southern District of that state; and the defendant Bonding Companies are both Maryland corporations, having agents in the Northern District of Ohio, Western Division, upon whom service of process could be and was made.

Upon the bill above mentioned and supporting affidavits the District Court in Ohio entered a restraining order (Record p. 41), by which the Computing Company was restrained from enforcing its Illinois decree. The Toledo Company's motion for a preliminary injunction was heard on evidence from both sides, and while the District Court was considering this motion and the objections of the Computing Company to the granting of the same, the Computing Company obtained an order from the Circuit Court of Appeals for the Seventh Circuit, requiring Toledo Company to show cause why it should not be enjoined from maintaining its Ohio suit and requiring the Bonding Companies who had as sureties executed supersedeas bonds in the Illinois case to show cause why summary decree should not be entered against them. (Record p. 1). Before hearing on the answers to this order to show cause, the District Court in Ohio issued a preliminary injunction restraining Computing Company from enforcing its Illinois decree against Toledo Company, or the Bonding Companies. (Record p. 442). Thereafter Toledo Com-

pany and the Bonding Companies answered the order to show cause in the Circuit Court of Appeals for the Seventh Circuit, Toledo Company by its answer (Record p. 228) setting up all of the proceedings in the Ohio case, and that Court, after hearing, took the matter of the issuance of a supplemental order under consideration (Record p. 478). Before the Circuit Court of Appeals decided the question as to whether it should issue any further order Computing Company perfected an appeal from the order of preliminary injunction issued by the District Court in Ohio to the Circuit Court of Appeals for the *Sixth* Circuit. Thereafter the Circuit Court of Appeals for the *Seventh* Circuit handed down an opinion holding that notwithstanding the petition before that Court constituted a collateral attack (Record p. 481) upon the proceedings in the Ohio District Court, that the Circuit Court of Appeals had jurisdiction to entertain and grant relief upon it, and directed the Clerk to issue a mandate unless the mandate were stayed in the manner prescribed in the opinion. The mandate formulated by said opinion is as follows: (Record p. 488)

> "1. Enter of record our affirmance of the final decree on accounting.
>
> "2. Enjoin Toledo Company from further maintaining its Ohio bill and from filing elsewhere any similar bill.
>
> "3. Enter summary decree against the sureties on the supersedeas bonds for the amount due upon the accounting decree, including all costs in both courts, but not exceeding the penalties of the bonds.

> "4. Ascertain Computing Company's expenses in this matter, including reasonable attorneys' fees paid or incurred since the Supreme Court's denial of the petition for writ of certiorari on January 9, 1922 and enter summary decree therefor against the Toledo Company, but not against the sureties on the supersedeas bonds."

The issuance of this mandate was thereafter stayed by this court, and thereafter a writ of certiorari was issued by this Court on the petition of Toledo Company and a separate writ of certiorari was issued by this court on the petition of the Bonding Companies who were on the supersedeas bond. By stipulation both proceedings are to be heard and submitted upon one record (Record p. 495).

By further stipulation (Record p. 497), it has been agreed, "that certified copies of the transcripts of record herein heretofore filed in the Supreme Court of the United States as aforesaid," (i. e. the transcript filed with the petition which was denied on January 9, 1922, and the transcript filed with the present petition), "together with a certified record of all proceedings had herein," (i.e., in the Circuit Court of Appeals for the Seventh Circuit), "since April 12, 1922 may be taken as the return to said writ of certiorari."

It is our understanding of the decisions of this Court, such as *Hamilton Shoe Company v. Wolf Bros.*, 240 U. S. 251, and others, hereinafter discussed, that the writ of certiorari issued by this court brings up the entire record, including not only the final order of

affirmance and for injunction hereinbefore quoted but also the accounting decree and the decree finding validity and infringement of the patent, and that all questions presented by either of the two appeals are now before this court for review, and further that the fact that this court, at an earlier stage in the proceedings, declined to issue a writ of certiorari, in no manner restricts its authority now to deal with any question in the record. This being so, we shall, in this brief, present first, a statement of facts and argument and authorities in support of our position that the order of the Circuit Court of Appeals for the Seventh Circuit is erroneous in so far as it directs a mandate (1) enjoining Toledo Company from further maintaining its Ohio bill; (2) entering summary decree against the sureties on the supersedeas bonds and (3) entering summary decree against Toledo Company for Computing Company's expenses, including attorneys' fees since January 9, 1922, and is beyond the jurisdiction of the Circuit Court of Appeals.

In the second section of this brief we shall present a statement of facts and argument and authorities in support of our positions,

(a) That the reissued patent in suit is invalid and void for lack of patentable novelty and invention over the prior art.

(b) That it is completely anticipated by the Phinney commercial scales, the evidence concerning which was rejected and not considered by the Court of Appeals.

(c) That the patent in suit is invalid as a

reissue, being a patent for a different invention from that claimed as the patentee's invention in his original patent.

(d) That if the patent can be sustained as a valid patent, on the construction given the claims in suit by the Court of Appeals, it is not infringed by defendant's scale.

(e) That the Court of Appeals erred in refusing to apportion defendant's profits and in awarding plaintiff defendant's entire profits.

THE BILL OF COMPLAINT IN THE OHIO DISTRICT

The bill of complaint filed in the District Court of Ohio by Toledo Company against Computing Company for injunction restraining the enforcement of the Illinois decree sets forth the proceedings had in the Illinois case up to the time of the filing of that bill. Repetition will, therefore, be saved by summarizing herein the allegations of that bill and supplementing the same by a statement as to other and subsequent proceedings in the Seventh Circuit, and in the Ohio District.

The Ohio bill alleges Toledo Company since 1901 has been a competitor of the Computing Company; that in pursuance of a conspiracy in restraint of trade the Computing Company has long been attempting to ruin Toledo Company and drive it out of business. That Toledo Company exposed the dishonest character of certain scales manufactured and sold by Computing Company (Record p. 14) and successfully established the dishonesty of said scales in the Circuit Court of

Appeals for the Sixth Circuit (Record p. 15). That this had the result of intensifying the efforts of Computing Company to ruin Toledo Company and that among these efforts and in pursuance of the conspiracy Computing Company brought a number of unfounded suits against Toledo Company, most of which it dismissed without trial. That among the suits so brought was one brought in 1907 in the District Court of the United States for the Northern District of Ohio alleging infringement of Smith Reissue Patent No. 11536. That the novelty of the Smith patent was claimed to be, that the indicating cylinder was to be of light weight skeleton construction covered with paper. That prior to beginning this suit Computing Company, through suits brought by it against others in the Eastern District of Pennsylvania, had learned that the Smith Patent had been fully anticipated by the commercial practice of one William H. Phinney.

That said Phinney had a patent on a scale having an indicating cylinder, but that the patent did not specify that the cylinder should be light, but that "the scales actually manufactured by said Phinney and put in use, and three of which were exhibits produced and identified in the evidence in said case in the Eastern District of Pennsylvania, in fact embodied a light weight skeleton cylinder, substantially identical with that called for by the Smith patent." (Record p. 16) That when this evidence was brought into the Pennsylvania suits the Computing Company abandoned the Pennsylvania suits and then set about a deliberate and sytematic search for

all the scales made by Phinney, which were comparatively few in number, for the purpose of obtaining possession of them and secreting them and suppressing all knowledge of their existence.

The bill alleges that in the Pennsylvania suits a stipulation was entered into "by which stipulation the proofs and exhibits in said case were not filed of record but were to be left in the custody of the counsel for the party on whose behalf they were presented respectively," and further, that the Phinney scale exhibits "were turned over by counsel for said Federal Scale Company" (one of the defendants in the Pennsylvania suit), "to one of counsel for said The Computing Scale Company, defendant herein, and remained in the possession of said counsel for said The Computing Scale Company, as plaintiff is informed and believes, and therefore avers, for a number of years and until, in fact, the time had expired within which this plaintiff as defendant could introduce evidence in said suit by The Computing Scale Company against this plaintiff as defendant in the United States District Court for the Northern District of Illinois, Eastern Division." (Record p. 17).

The Ohio bill alleges that the counsel for the Computing Company in the Pennsylvania suits advised the Computing Company that the Phinney practice was a defense to the claims based upon the Smith Patent. (Record p. 17) and that The Computing Company ultimately dismissed or permitted the dismissal of its Pennsylvania suits without submitting the merits of its

claims on said patent in those suits. (Record p. 17). That the Computing Company, when it filed its suits against Toledo Company in 1907, believed it had successfully suppressed all of the Phinney scales, and that it employed different counsel in the Ohio case (Record p. 18). The evidence in the Ohio record shows that these counsel ultimately learned of Phinney's commercial practice through correspondence with the Computing Company's counsel in the Pennsylvania cases (Record p. 387-390), and that the former counsel (Messrs. Church & Church of Washington) advised the Computing Company's Ohio counsel that the Phinney scale defense was "rather a dangerous one." (Record p. 391.) That the Ohio cases pended for several years without anything being done, and that the Computing Company then brought a new suit based upon the same Smith patent and another patent in the District Court of the United States for the Northern District of Illinois, Eastern Division. The decrees in this last suit are those which are now here for review on this writ of certiorari.

The Ohio bill alleges that prior to the beginning of this present suit the Computing Company made a renewed search for Phinney scales in the effort to make sure of the success of its fraudulent plan to suppress them from the Toledo Company and the courts: that in this suit the Computing Company employed still another set of solicitors, and did not inform them of the facts with reference to the prior use of the patented device by Phinney, and caused them to prepare a bill

alleging that Smith was the first discoverer of the device. That the solicitors acted in good faith but that the officers of the Computing Company then knew that this statement was false and caused it to be made and the suit to be filed "only because of the belief of said The Computing Scale Company that it had so completely and successfully suppressed and secreted the evidence necessary to demonstrate the falsity of said statement as that plaintiff herein, as defendant therein, could not prove the true facts" (Record p. 19). The Ohio bill alleges that the Toledo Company made the most diligent efforts to ascertain the state of the prior art with reference to the Smith patent and that it learned of the fact that Phinney had obtained a patent, which patent called for an indicating cylinder but did not specify a light weight or a skeleton cylinder. The bill alleges that Toledo Company spent thousands of dollars in investigating the prior art, in searching records and in investigating information as to the manufacture of scales by various persons and incorporations, but that

> "By reason solely of the fraudulent acts and conduct of said The Computing Scale Company as herein set forth, The Toledo Scale Company, plaintiff herein, as defendant in said suit in said Eastern Division of the Northern District of Illinois was unable to and did not obtain any knowledge or information of the true facts with respect to the manufacture and use of the Phinney scales until after the decree of said District Court had been entered sustaining the validity of the alleged patents of the

plaintiff, The Computing Scale Company, in said suit, and finding that the plaintiff herein as defendant therein had infringed said patents. Plaintiff herein as defendant in said suit, was, by reason of the acts of The Computing Scale Company, plaintiff therein, unable to and did not raise any issue in the evidence as to the prior manufacture and use of scales under said Phinney patent with a cylinder of light weight skeleton construction and was unable and did not offer any evidence contesting the claims of The Computing Scale Company that there never had been any such manufacture and use. (Record p. 21.)

* * * * *

"As a result solely of said fraudulent practices and conduct upon the part of said The Computing Scale Company and its co-conspirators aforesaid it was successful in obtaining a decree from the said District Court for the Eastern Division of the Northern District of Illinois against this plaintiff as defendant in said suit sustaining the validity of said two Smith patents and finding this plaintiff to have infringed same." (Record p. 21).

The bill sets out some of the claims made by counsel for the Computing Company in their briefs on Toledo Company's first appeal. (Record pp. 21 and 22). The bill alleges that by reason of the fact that the fraudulent suppression of the Phinney scales had kept evidence with respect to them out of the record, Toledo Company's counsel were unable to controvert these claims made by counsel for the Computing Company (Record p. 23). Among the claims made by counsel for Computing Company was:

"The third class of scales, namely, automatic computing scales, never existed until Smith devised the structure set forth and claimed in Reissue Patent No. 11536." (Record p. 21).

"Examination of the many witnesses produced in this case failed to show that any scales had ever been built by Phinney." (Record p. 21).

Another was:

"Neither the Phinney nor the Babcock patent contains any allusion whatever to the necessity of making the revolving drum of extreme lightness and subsequent developments demonstrate that neither of them knew that the revolving drum of such a scale must be light, in order to make the difference between failure and success." (Record pp. 21 and 22).

And perhaps most enlightening of all, this:

"It has been contended in argument by defendant that whenever the occasion arose for making a light drum it was merely a matter of mechanical skill to provide such a light cylinder. It is to be borne in mind, however, that this occasion never did arise until Smith discovered that the failure of prior automatic computing scales was due to the excessive weight of the mechanism. It required his discovery to cause this occasion to arise. For a quarter of a century prior to Smith's invention the occasion had arisen for constructing automatic computing scales and inventors had tried to construct them but they did not know wherein the difficulty consisted and it remained for Smith to discover the source of that difficulty and to remedy it." (Record p. 22).

The bill further alleges that the Smith patent

> "was sustained by said Circuit Court of Appeals upon the sole ground that as disclosed by the record before them the light weight cylinder was the invention of said Smith, and that until he had discovered the necessity for a light weight cylinder no one had ever made or used a successful computing cylinder scale." (Record p. 23).

That the Circuit Court of Appeals said, in its opinion:

> "Defendant insists, however, that making the drum lighter was merely a matter of degree. Of course the lessening of weight is a matter of degree; but it is not necessarily merely a matter of degree. If the change converts failure into success, something more than a matter of degree is involved."
>
> "The quoted part of the applicant's original description shows that the idea of the light drum, the purpose to be accomplished by it, and the means by which it was to be produced, constituted the principal part of his invention." (Record p. 24).

That these conclusions of the Circuit Court of Appeals

> "were based, of course, solely upon the record which was then before that court, which record, by reason of the fraudulent conduct of The Computing Scale Company and its co-conspirators aforesaid was, as hereinbefore shown, barren of any evidence showing the manufacture under the Phinney patent and the sale and long continued successful use of computing scales having a light weight cylinder or indicating

drum substantially identical with that claimed by said The Computing Scale Company to have been invented by said Smith. The true facts with respect to the prior manufacture and successful use of such a computing scale with such a light weight cylinder were the exact opposite, as hereinbefore set forth, of those upon which the court based its opinion sustaining said Smith patent, and the act of said The Computing Scale Company in urging upon said court the validity of said Smith patent upon such ground, and in seeking and obtaining from said court said opinion based on said claim, constituted a fraud and imposition upon said United States Circuit Court of Appeals for the Seventh Circuit, as well as upon this plaintiff." (Record p. 24).

The bill alleges that the Circuit Court of Appeals for the Seventh Circuit found that one of the two patents involved in that case, patent No. 579300, was invalid, but as above shown, held that reissue No. 11536 was valid. It further held, however, that the Computing Company had not proved title in itself to reissue No. 11536 and remanded said cause to the District Court with the direction to dismiss the bill on patent No. 597,300, and to permit Computing Company to introduce proof of title to patent reissue No. 11536. (Record p. 25).

The Ohio bill alleges that the first knowledge that Toledo Company ever had that Phinney had manufactured scales with light computing drums, or cylinders of skeleton formation, covered with paper, came to it during the pendency of Toledo Company's appeal in

the patent decree of the District Court in Illinois. (Record p. 25), and that it obtained this knowledge from counsel for Standard Computing Scale Company, which had been sued by the Computing Company for alleged infringement of No. 11536 in the District Court for the Eastern District of Wisconsin. The bill alleges that during the pendency of the Toledo Company's appeal, one of its solicitors

> "was informed by one of the counsel for said Standard Computing Scale Company that he, the said counsel for said Standard Company, had learned accidentally long after said Standard Company had filed its answer that there had been some scales manufactured under the Phinney patent, and that said scales had very light computing drums whose shells or cylinders were formed of paper. (Record p. 25).

The bill avers that Toledo Company's counsel made a diligent investigation and search with respect to this matter and found that the inventor, Phinney, had been dead for some ten years, but finally located his son, Thomas Z. Phinney, (who had removed to another city from that in which the father, William H. Phinney, had lived and manufactured said scales), and that from this son, and others, Toledo Company obtained affidavits

> "with respect to the manufacture by said Phinney of successful computing scales of the types and embodying the light weight cylinders aforesaid and of the use of said cylinders by a number of storekeepers and others, and also obtained an affidavit from the counsel for the

> Standard Computing Scale Company in which said counsel showed that his discovery of the fact that said Phinney had manufactured said computing scales with said light weight cylinders was accidental." (Record p. 26).

The bill alleges that Toledo Company then

> "moved the Circuit Court of Appeals for leave to dismiss its appeal as to the reissued patent in suit in order that the District Court might entertain an application to re-open this cause for newly discovered evidence."

and that

> "This motion was denied by said Circuit Court of Appeals." (Record p. 26).

The bill alleges that after the Circuit Court of Appeals had handed down its first opinion hereinbefore mentioned, which included the privilege to the Computing Company to take additional testimony to establish its title, that Toledo Company filed in the Circuit Court of Appeals its motion supported by affidavits that its mandate should include permission to the District Court to

> "entertain and consider, and if so advised, to grant an application of the defendant for leave to introduce proofs in said cause respecting computing scales alleged to have been manufactured and sold and introduced into use by William H. Phinney of Pawtucket, Rhode Island, prior to the date of the invention described and claimed in the reissue letters patent in suit in said cause and to rehear said cause on such additional proofs." (Record p. 26).

That this motion was denied by the Circuit Court of Appeals.

(Some additional facts and excerpts from the record with respect to the two applications to the Circuit Court of Appeals for the Seventh Circuit will be set forth in that portion of this brief which deals with the claim of the Computing Company that the action of the Circuit Court of Appeals on these applications is *res judicata* of the issues in the Ohio case.)

The Ohio bill further alleges

> "This plaintiff as appellant in said proceeding did not request said modification of said mandate or any other relief from said Circuit Court of Appeals on the ground that The Computing Scale Company had fraudulently deprived the plaintiff of the opportunity to present its defense by purchasing and secreting the Phinney scales for the reason that it had not then discovered the fraudulent acts and suppression of evidence by said The Computing Scale Company in said respects hereinbefore set forth." (Record p. 26).

That when the cause came on for hearing in the Illinois District Court upon the remand, additional evidence was taken as to title and that Court entered a decree finding that title had been proved by the Computing Company and referred the cause to the Master for an accounting of the amount to be recovered by the Computing Company from Toledo Company by reason of the infringement, and that the Master heard evidence, and reported to the Court that the Computing

Company was entitled to receive from Toledo Company $404,001.97. That this finding of the Master was affirmed by the District Court and a decree, including interest on the amount found by the Master to be due, was entered for $420,883.44, and subsequently affirmed by the Circuit Court of Appeals for the Seventh Circuit. (Record p. 27).

The Ohio bill alleges that in the proceedings before the Master, Toledo Company

> "offered evidence of the prior manufacture, sale and use of said light weight cylinder in said computing scale so manufactured by said Phinney, but said Master and the District Court and said United States Circuit Court of Appeals each and all declined to consider said evidence, either as bearing upon the validity of said reissued patent No. 11536 or as affecting the amount recoverable by said The Computing Scale Company. Said Master ruled that he was bound by the opinion of said Circuit Court of Appeals to the effect that the Smith scale under said reissued Patent No. 11536 made upon the first appeal, was the first successful automatic computing scale, and that Smith was the inventor and discoverer of the light weight cylinder for use therein, and the District Court affirmed the Master without opinion; and the Circuit Court of Appeals upon this point in their second opinion said:
>
> 'Respecting the insistence that, on the proofs offered to the Master and embodied in the record concerning Phinney's commercial practice as an anticipation, we should reverse our denial of defendant's 1915 petition to reopen the case

on the merits, should reverse our precedent decree upholding the validity of the patent and should reverse the District Court's decree of 1914 and 1919 with the direction to dismiss the bill, we say:

'A. If it be regarded as a demand to interpose a defense of invalidity as a matter of right because validity has not yet been adjudicated, our conception of the nature of the merits decree leaves us to reject the demand.

'B. If it be regarded as a petition in the nature of a bill of review appealing to equitable discretion, then defendant's delay of eight years in presenting to us its bill of review to open our 1913 dismissal of its former bill of review on the same grounds inclines us to stay our hands.'" (Record p. 27).

The Ohio bill alleges that Toledo Company did not present to the Circuit Court of Appeals

"either in the record taken before the Master or before said District Court, or otherwise, any evidence with respect to the fraudulent suppression of evidence by said The Computing Scale Company for the reason that plaintiff had no knowledge that said The Computing Scale Company had purchased and secreted or destroyed any of said Phinney scales until on or about the 20th day of December, 1921, and long after the second decision of said case by said Circuit Court of Appeals."

The bill alleges that:

"This plaintiff never has had its day in Court to present to any court on its merits the true facts with respect to the manufacture, sale and successful use of computing scales under the

Phinney patent embodying a cylinder or indicating drum substantially identical with that described in and covered by said Smith reissued patent No. 11536 and has had no hearing or opportunity to be heard prior to this time in any court with respect to the frauds practiced upon it and upon said District Court for the Eastern Division of the Northern District of Illinois and said United States Circuit Court of Appeals for the Seventh Circuit." (Record p. 28).

The Ohio bill alleges (including amendments) (Record pp. 33, 37) the giving of a supersedeas bond in the amount of $450,000 to stay execution of the Illinois money decree upon the appeal to the Circuit Court of Appeals and an additional bond in the amount of $50,000 to stay the mandate of the Circuit Court of Appeals pending the application to this court for writ of certiorari which was denied on January 9, 1922. That the $450,000 bond was signed by the Fidelity and Deposit Company of Maryland and the United States Fidelity & Guaranty Company as sureties, and the $50,000 bond was signed by the Fidelity & Deposit Company of Maryland, as surety, and that in order to secure the execution of the $450,000 bond, Toledo Company gave to the Bonding Companies Toledo Company's certified checks for $455,000 drawn upon sundry Toledo banks and one Cleveland Bank, that one of the Bonding Companies deposited these certified checks to its account in the several banks upon which they were respectively drawn, and received

from the banks unconditional certificates of deposit in its favor, and that these certificates of deposit are held by Fidelity & Deposit Company as security against the loss by it and United States Fidelity & Guaranty Company on the $450,000 supersedeas bond, and that the interest which has accumulated on the certificates of deposit stands as security for Fidelity & Deposit Company of Maryland against loss by reason of its execution of the $50,000 bond. The bill alleges that the amount of the money decree with interest was in excess of $490,000 when the bill was filed, and that the Computing Company is about to enforce its decree by levy upon certain property of Toledo Company, or by enforcing payment by the Bonding Companies, that if the Bonding Companies are forced to pay, they will at once cash the certificates of deposit held by them. The amendment to the bill alleges, (Record p. 37), that to enable Toledo Company to give its certified checks to the Bonding Companies plaintiff had to borrow money from the several banks, and to enter into an agreement by which it deposited with a Trust Company for the security of the banks, various collateral securities aggregating $705,000, (including any equity Toledo Company had in the certificates of deposit over the amount which might be needed to indemnify the Bonding Companies), and that if the certificates of deposit were cashed by the Bonding Companies, the Banks would require Toledo Company to repay its indebtedness to the banks and that Toledo

Company would be unable to make such payment except by submitting to a sale of the collateral security which would result in a great loss to it. (Record pp. 38, 39).

The bill alleges that should the decree be enforced Toledo Company would be greatly crippled in its business operations, its business would be curtailed and it would be exposed to grave danger of complete ruin and the levy of execution upon said decree ~~and~~ upon its property would greatly injure its credit. That Toledo Company has exhausted every remedy which it has in said suit in which said judgment (decree) was obtained against it by the Computing Company, and has no remedy except in equity. (Record p. 35).

The Ohio bill had attached to it certain affidavits (Record pp. 278 to 304), some of which were designed only to establish the fact of the manufacture and sale by Phinney of computing scales with light weight skeleton cylinders many years prior to Smith's original application. Affidavits of this character are similar to and in some instances substantially identical with those which had been offered to the Circuit Court of Appeals in support of Toledo Company's motion that its mandate permit an application to the lower court for leave to introduce the Phinney scale testimony. Another class of affidavits, however, (some of which were attached to the Ohio bill and some filed later), was entirely distinct from anything which had been presented to the Circuit Court of Appeals. These

affdavits are those which show the fraud of the Computing Company in purchasing, secreting and suppressing from the courts and Toledo Company, the Phinney scales and the testimony of witnesses who were familiar with them. Among the affidavits of this kind, which were attached to the Ohio bill and referred to therein, is that of Albert U. Smith (Record p. 291-2) sworn to on December 20, 1921, which was the first real evidence that Toledo Scale Company ever obtained of fraudulent search for and suppression of Phinney scales by the Computing Company.

PROCEEDINGS IN THE DISTRICT COURT IN OHIO AND IN THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AFTER THE FILING OF THE OHIO BILL

Upon the filing of the bill of complaint with supporting affidavits corroborating its allegations attached, a temporary restraining order was issued by the court, effective until January 19, 1922, on which date the court set for hearing plaintiff's motion for a preliminary injunction. On January 19, 1922 plaintiff's motion for a preliminary injunction came on for hearing. The record of the proceedings in court upon that hearing will be found at pages 355 to 377 of the Record. It shows (page 355) appearances as follows:

> "Thomas H. Tracy, Esq., George D. Welles, Esq., on behalf of complainant.

"John M. Zane, Esq., E. R. Effler, Esq., Leroy Eastman, Esq., on behalf of Defendant."

Counsel for plaintiff offered in evidence the bill of complaint and amendments thereto and affidavits attached to the bill of complaint and certain other affidavits (Record 355, 356). Counsel for plaintiff then requested the court to hear oral evidence. The court stated that its engagements were such that oral evidence could not be taken, unless a master were appointed. Counsel for plaintiff stated, "If Your Honor cannot hear it, why then we will have to take a master, of course."

Mr. Zane, counsel for defendant, whose appearance had already been entered, as above shown, then called attention to the provisions of the Clayton Act and of Equity Rule No. 73 with reference to the procedure on applications for preliminary injunctions, arguing that the hearing should proceed without the appointment of a master, and said:

> *"We are here ready to answer to this showing that is made by the verified bill and by the affidavits served upon us,* and we therefore think that as a matter of right under the statute we are entitled to have the matter proceed." (Record 358)

Mr. Zane further said:

> "We have an answer, and we have filed in connection with it three affidavits, which simply go to isolated matters, stated in the answer, and *that is the showing that we make here in answer to the verified bill and the affidavits.*

> "Now, it ought not—may I ask to have those filed, Your Honor—it ought not to require any great amount of time from the court. All the court will have to do here is to pass upon the question as to whether or not this matter has been adjudicated. * * *" (Record 364).

What Mr. Zane asked to have filed at the point above shown was his answer and supporting affidavits. This answer consists of an attack upon the jurisdiction of the court, combined with a plea of *res adjudicata* and an answer to the merits. It was the first pleading filed by The Computing Company and it was filed after the general appearance and participation in the proceedings by counsel for the defendant, as above shown. The plea of *res adjudicata* contained in the answer was the only thing which was urged upon the court by counsel for The Computing Company upon this hearing.

On January 20, 1922 the Bonding Companies filed an answer and a petition in the nature of an interpleader (Record 101). This pleading interpleads both The Computing Company and Toledo Company and declares the willingness of the Bonding Companies to turn over the Four Hundred Fifty-five Thousand Dollars ($455,000.00) and interest (in the aggregate exceeding the amount of the decree with interest) which it held to either of the Scale Companies, as the court might order, and requested that they both be required to set up their rights to it.

To this petition filed by the Bonding Companies, the Computing Company on January 28, 1922, without

moving to quash the service of process upon it thereunder or to dismiss the Bonding Companies' pleading for lack of jurisdiction or otherwise, filed an answer to the merits (Record 115).

Thereafter Toledo Company and The Computing Company both filed additional affidavits and the restraining order was renewed from time to time. On January 28, 1922, the court filed an opinion on the question of its right to continue the restraining order in effect after twenty days from the date it was originally granted and held that the court had the power so to do. In the course of this opinion the court said:

> "The proof by affidavit already made is sufficiently impressive to suggest that there was no improvidence in the issuing of the temporary restraining order, and the unanswered affidavits filed by plaintiff on the 26th, together with our hasty review of defendant's answer, leave the court with no present feeling that the motion of defendant to dismiss might be allowed in the exercise of a just discretion. On the facts now appearing, we find a stronger ground to justify a temporary restraining order than even in the first instance." (Record 123).

On February 7th the court entered an order continuing the restraining order in effect until February 13, 1922, and ordered

> "that the parties to this case having further affidavits to be filed previous to the determination of the court on the motion of the defendant to dismiss, as aforesaid, file said affidavits herein on or before the 10th instant." (Record 124.)

Toledo Company and the Computing Company both thereafter filed affidavits, each filing one or more on February 10, 1922, the last day for the filing of same under the above quoted order, and on February 10th Toledo Company filed a memorandum in support of its motion for a preliminary injunction, in which it stated:

> "Plaintiff is now satisfied to submit its motion for a preliminary injunction upon the affidavits and exhibits which have been filed herein, requesting leave, however, to complete this record upon the motion by having brought into the record certain exhibits which were in evidence on the first trial in the Chicago litigation." (Record p. 239.)

On this same day, February 10, 1922, the Computing Company filed its petition in the Circuit Court of Appeals for the Seventh Circuit seeking an order upon the Toledo Company to show cause why it should not be enjoined from maintaining the bill in the present suit, and why it and the Bonding Companies, as sureties on the supersedeas bonds in the Seventh Circuit, should not be ordered to pay the decree (Record p. 3). And on the same day an order was issued by the Circuit Court of Appeals against the Toledo Company to show cause why such relief should not be granted against it (Record p. 1).

These proceedings in the Circuit Court of Appeals for the Seventh Circuit were brought to the attention of the District Court in Ohio before the court filed its opinion upon the several motions which were pending

before it. This opinion was filed February 13, 1922 (Record p. 445), and we respectfully invite the court's attention to it. The District Court at the same time filed an addendum to its opinion (Record p. 464), dealing with the situation created by the petition filed in the Circuit Court of Appeals for the Seventh Circuit and the order to show cause issued thereon, and holding that there was nothing in that proceeding which prevented it from proceeding with the determination of the issues raised before it.

The opinion held that the motions to dismiss should be overruled, that the plea of *res adjudicata* was not well taken and that a preliminary injunction should be granted upon the giving of an injunction bond in the amount of Fifteen Thousand Dollars ($15,000.) (Record p. 464). This bond was promptly given and an order was thereupon entered on February 13, 1922, granting the preliminary injunction (Record 442). This order finds that plaintiff's

> "showing of fraud on the part of The Computing Scale Company and of diligence upon the part of Toledo Scale Company in discovering and bringing same to the attention of this court are of such strength and character as that this court should, in the interests of justice, maintain the situation of the parties in statu quo pending a full inquiry and final determination with respect to said alleged fraud of The Computing Scale Company." (Record 443.)

The court further found that the Computing Company had entered its appearance and "submitted its

person and the said controversy to the jurisdiction of this court," and that an injunction should issue restraining the Computing Company from enforcing the decree against Toledo Company and the bonding companies, restraining the bonding companies from paying the decree and from transferring or cashing any of the certificates of deposit, and restraining the defendant banks from paying to the bonding companies the principal or interest of the certificates, and restraining the Summit Trust Company from selling or otherwise disposing of the collateral security (Record pp. 442 et seq.)

Before entering this order the court gave the defendant the Computing Company an opportunity "to obtain additional time for the filing of further evidence upon making application therefor" to the court, but no such application was made. (Record 442.) On the contrary, counsel for the Computing Company, on February 13, 1922 by letter to the Judge of the District Court objected to the continuance of the temporary restraining order. (Record 240). The court thereupon proceeded to decide the motion for a preliminary injunction.

The petition of the Computing Company came on for hearing in the Circuit Court of Appeals for the Seventh Circuit and by the opinion as is hereinbefore shown, that court ordered the issuance of a mandate to the District Court for the Northern District of Illinois, Eastern Division, to issue an injunction restraining Toledo Company from further maintaining the suit in

the Northern District of Ohio and directing the District Court in Illinois to enter a summary decree against the Bonding Companies and a decree against Toledo Company for the expenses of Computing Company incurred in the litigation since Jan. 9, 1922.

Thereafter, upon application of Toledo Company and the Bonding Companies, the present writs of certiorari were issued by this Court.

ARGUMENT UPON FACTS AND LAW

Our contentions herein are as follows:

I. The District Court for the Northern District of Ohio, Western Division, has full jurisdiction over the parties and of the controversy as to whether the Computing Company's decrees in the Seventh Circuit were obtained by extrinsic fraud.

II. The Circuit Court of Appeals erred in holding that it had jurisdiction to enjoin the proceedings in the District Court in Ohio or to penalize Toledo Company for bringing the Ohio suit.

III. The District Court in Ohio was right in granting the injunction.

A. A Party who obtains a judgment or decree by extrinsic fraud may be enjoined from enforcing such judgment or decree by any court of equity having jurisdiction of the parties.

B. The general rule applies to enjoining the enforcement of a decree on the merits in a patent suit obtained by extrinsic fraud by an

original bill in another court of equity.

C. The general rule applies to enjoining the enforcement of a judgment or decree of one Federal court by another Federal court.

D. The general rule applies to enjoining the enforcement of a decree of one court of equity by another court of equity.

IV. The Circuit Court of Appeals erred in holding that the fraud complained of in the Ohio bill is not extrinsic fraud.

V. The Circuit Court of Appeals erred in holding that it had ever passed upon the question of fraud which is raised in the Ohio case.

VI. The Circuit Court of Appeals erred in holding that its refusal to grant applications of Toledo Company for leave to apply to the District Court in Illinois for leave to introduce newly discovered evidence was a final decree, barring relief under the Ohio bill based on extrinsic fraud.

VII. The order directed by the Circuit Court of Appeals operates to protect the wrongdoer and to punish the innocent.

VIII. Contentions made by the Computing Company are unfounded.

IX. All questions which were before the Circuit Court of Appeals for the Seventh Circuit on either of the two appeals are now before this court for review.

We shall discuss the foregoing propositions in the above order. (In the second section of this brief other questions going to the merits of the original decree of the Circuit Court of Appeals sustaining the Smith Reissue Patent and questions arising upon the accounting decree will be discussed.)

I. The District Court For The Northern District of Ohio, Western Division, Has Full Jurisdiction Over The Parties And of The Controversy As To Whether The Computing Company's Decrees in The Seventh Circuit Were Obtained By Extrinsic Fraud.

The bill of complaint as amended shows a continuous chain of interlocking rights and liabilities among the several defendants and the plaintiff Toledo Company with respect to the decree in the Seventh Circuit. The decree is against the plaintiff. The bonding companies are plaintiff's sureties for the stay of execution of the decree. The sureties are in turn indemnified by the certificates of deposit issued to them by the several bank defendants. The bank defendants are in turn indemnified by the notes of Toledo Company and the collateral agreement by which Toledo Company deposited securities with The Summit Trust Company for the protection of the banks. Following the chain through in reverse order, Toledo Company pledged securities to enable it to borrow money from the bank

defendants to be used to indemnify the bonding companies against liability upon bonds to be executed to secure the Computing Company against loss by reason of the stay of execution of the decree against Toledo Company.

Toledo Company might have proceeded by ancillary bill in the District Court for the Northern District of Illinois Eastern Division to restrain the Computing Company from enforcing the decree against it or against the bonding companies. That court, however, could not have granted Toledo Company the full and adequate relief which can be and has been temporarily granted by the District Court in Ohio. The District Court in Illinois could obtain no jurisdiction over the Toledo banks and it could not have interfered in any way with the cashing of the certificates of deposit by the bonding companies. If the bonding companies had been made parties to such ancillary bill in the Illinois District they could have escaped the jurisdiction of that court by a plea to the jurisdiction and inasmuch as that court could not have interfered with the payment of the money by the banks on the certificates of deposit there would have been no occasion for the bonding companies to have submitted themselves to the jurisdiction of that court. Even had they been made parties and submitted themselves to the jurisdiction of that court, still that court could not have given the full relief which the court has temporarily given plaintiff, for that court, having jurisdiction of the bank defendants, has protected plaintiff against loss from the sale of its collateral

at a sacrifice for the payment of its indebtedness to the bank defendants. Manifestly it would be inequitable to permit the bank defendants to sell plaintiff's other collateral at a sacrifice if the certificates of deposit which are collateral for Toledo Company's indebtedness to the banks (in subordination to the claim of the bonding companies thereon) are available for the payment of that indebtedness. These certificates will be so available if Toledo Company is successful in maintaining its position that the decree in the Seventh Circuit was obtained by fraud of the Computing Company.

The foregoing considerations, we submit, clearly demonstrate that Toledo Company properly and necessarily joined the bank defendants as defendants in the Ohio suit, and that had it not done so or if it had been unable to do so it would have been exposed to irreparable loss by the sale of its collateral, even though it should ultimately prevail in its contentions against the Computing Company.

The bank defendants, being citizens and residents of the Northern District of Ohio and all but one having their principal place of business in the Western Division of that District, the suit was properly filed in the court below and process properly issued and served upon the Computing Company in the Southern District of Ohio, as is provided for in such cases by Jud. Code Sec. 52.

The bonding companies have raised no question as to the jurisdiction of the District Court in Ohio. Obviously it is to their interest not to do so, since that

court has jurisdiction of the moneys which the banks hold for the indemnity of the bonding companies. If the bonding companies had not been made parties defendant it is clear that they would have wanted to intervene so that they might obtain protection against the enforcement of the Seventh Circuit decree against them if Toledo Company should prevail, and so that they might have the indemnity moneys turned over to them for their protection if the Computing Company should prevail. The bonding companies filed an answer and petition in the nature of an interpleader and thereby fully submitted their persons to the jurisdiction of the court. The foregoing facts demonstrate that the suit was properly planted in the District Court in Ohio, and that full jurisdiction of the Computing Company was obtained by the service of process upon it.

The District Court in Ohio not only has jurisdiction of the Computing Company for the reasons just stated but also has full jurisdiction of its person because of the fact that the Computing Company entered its appearance and fully submitted its person to the court below before attempting to raise any question as to the jurisdiction of the court over it. In the Statement of Facts herein we have pointed out that the record shows that Mr. Zane, Mr. Morse, Mr. Effler and Mr. Eastman all appeared for the Computing Company upon the beginning of the hearing of plaintiff's motion for a preliminary injunction and that this appearance was not special or restricted

or qualified in any way, and that Mr. Zane stated in open court:

> "We are here ready to answer to this showing that is made by the verified bill and by the affidavits served upon us, and we therefore think that as a matter of right under the statute we are entitled to have the matter proceed." (Record p. 358.)

and that the matter which he desired to have proceed was the hearing upon our motion for preliminary injunction and that Mr. Zane proceeded to argue the question of *res judicata* before the filing of any pleading, and after filing a pleading combining a motion attacking the jurisdiction of the court and a plea of *res judicata* and an answer to the merits proceeded to argue to the court nothing but the plea of *res judicata*. All of this conduct clearly constituted an entry of a general appearance.

Interior Constr. Co. vs. Gibney, 160 U. S. 217.
Atkins vs. Disintegrating Co., 18 Wall. 272, 273-4, 298.
Board of Road Com'rs. vs. Keil, 259 Fed. 76, 81.
Everett Ry. Co. vs. U. S., 236 Fed. 806, 808.
McLean vs. United States, 237 Fed. 460.
Mahr vs. Union Pacific Ry., 140 Fed. 921.
Briggs vs. Stroud, 58 Fed. 717.
Crawford vs. Foster, 84 Fed. 939.
4 C. J., p. 1333.

If this were not enough, however, to enter the appearance of the Computing Company, it was most effectually entered by the pleading which was filed. This pleading is entitled "Separate answer of the defendant, The Computing Scale Company," (Record p. 126), paragraph No. 1 of which reads:

> "The Defendant, The Computing Scale Company, appearing specially for the purpose of making the following objections to the jurisdiction of this court *over the matters and things set forth in the bill of complaint of the plaintiff herein says*: (Italics ours.)
>
> "(a) That it appears by said bill of complaint that the only parties defendant within and subject to the jurisdiction of this Court and upon whom process can lawfully be served in this action are the defendants First National Bank of Toledo, Ohio, Second National Bank of Toledo, Ohio, Northern National Bank of Toledo, Ohio, The Commerce-Guardian Trust and Savings Bank and the Guardian Savings and Trust Company, and the last named defendant is not subject to be sued in the Western Division of the Northern District of Ohio, and all said parties defendant last named are neither proper nor necessary parties to this action and are joined as parties defendant herein solely for the purpose of seeking to give this Court jurisdiction, and the other parties defendant The Computing Scale Company and Fidelity and Deposit Company of Maryland are not subject to be sued in this Court and upon them process cannot lawfully be served in this action, and
>
> "(b) That it appears that *there is a misjoinder of parties defendant* in that the said defendants First National Bank of Toledo,

Ohio, Second National Bank of Toledo, Ohio, Northern National Bank of Toledo, Ohio, The Commerce-Guardian Trust and Savings Bank and The Guardian Savings and Trust Company are each of them improperly joined as a defendant because each of them is not a proper or necessary party defendant, and, (Italics ours.)

"(c) *That the jurisdiction over the controversy and matters and things set forth in said bill of complaint is in the court where the said decree whose enforcement is sought to be enjoined herein, is now pending,* namely, the Circuit Court of Appeals for the Seventh Circuit and the court wherein said decree was rendered and will be hereafter pending, namely, The District Court of the United States for the Northern District of Illinois, Eastern Division, and, (Italics ours)

"(d) *That no jurisdiction of this Court* as a matter of usage and practice *exists to enjoin the enforcement of a decree of another District Court of the United States* rendered in such District Court sitting as a court of equity, where that latter Court can grant full relief." (Italics ours.) (p. 127.)

Paragraph 2 of the answer contains the motion to strike certain allegations from the bill of complaint. Paragraph 3 claims that the bill of complaint is insufficient in equity and in point of law and prays that it be dismissed. Paragraph 4 claims laches barring relief. Paragraph 5 sets forth an alleged plea of *res judicata* with numerous subparagraphs. Paragraph 6, with numerous subparagraphs, consists of an answer to the bill of complaint paragraph by paragraph.

This was the first pleading filed by the Computing Company. It was not preceded by motion to quash service of process upon it or by motion to dismiss for want of jurisdiction of its person. Its filing was, however, preceded by an appearance in open court by counsel for the Computing Company without any statement that it was a special appearance but, on the contrary, with a statement, hereinbefore quoted, "We are here ready to answer to this showing that is made by the verified bill and by the affidavits served upon us."

If a defendant can do all of these things and still succeed in entering only a special appearance, then, we submit, there is no way in which a defendant *can* enter a general appearance to which it can ever be held thereafter against its objection.

It is, of course, well settled that the filing of a pleading attempting to raise simultaneously questions of jurisdiction over the person and questions going to the merits is a waiver of the question of jurisdiction.

Thames vs. U. S., 237 U. S. 19.
St. Louis vs. McBride, 141 U. S. 127.
Jones vs. Andrews, 10 Wal. 327.
Norris, Inc. vs. Reed & Co., 278 Fed. 19, 23.
Lehigh Valley Co. vs. Yensavage, 218 Fed. 547, 550.
Clark vs. Claflin, 218 Fed. 429, 431.
Marian vs. Peale, 204 Fed. 161.
Nelson vs. Husted, 182 Fed. 921.
B. & O. vs. Doty, 133 Fed. 866.
Thomson vs. Electrose Co., 155 Fed. 543.

Lowry vs. Tile Assn., 98 Fed. 817.
4 Corpus Juris, 1318.

There is nothing in equity rule No. 29 which affects the doctrine established by the cases just cited. This is apparent from reading the rule, and it has been so held.

Benedict vs. Setters, 261 Fed. 492.
Goldman vs. Williams, 211 Fed. 530.
Everett vs. United States, 236 Fed. 806.
McLean vs. United States, 237 Fed. 460.

Moreover, not content with entering its appearance in the several ways already pointed out, the Computing Company filed an answer to the petition of interpleader of the bonding companies under which service of process had been made upon the Computing Company, without seeking to quash the service upon it or attacking the jurisdiction of the court over it by virtue of the interpleader and thus again fully submitted itself to the jurisdiction of the court.

If there is any one thing which is clear about the record in the present case it is that the court below had full jurisdiction over the person of the Computing Company.

That it had jurisdiction over the controversy is equally clear.

The United States district courts are courts of general chancery jurisdiction and as such have undoubted jurisdiction to entertain a bill for equitable relief by way of injunction. Any court having power

to grant injunctional relief which has jurisdiction of the person of a party defendant has jurisdiction to issue an injunction upon a bill praying for such relief, and its order whether right or wrong is not a nullity.

Toy Toy vs. Hopkins, 212 U. S. 542.
West vs. U. S., 258 Fed. 413 (C. C. A. 6th Ct.)
Dowell vs. Applegate, 152 U. S. 327, 340.

If the relief sought is against the enforcement of a judgment or decree which plaintiff alleges was obtained by reason of the fraud of the defendant, a United States district court in which the bill is filed has full power and authority to examine the bill and the evidence offered in support of it and to grant such relief as in its judgment the plaintiff is entitled to. The fact that the relief sought is to enjoin the defendant from taking any advantage from the judgment or decree of another court in no wise affects the power of the district court in which the bill is filed. The district court has plenary power and jurisdiction to entertain such a bill and to grant relief by way of injunction.

Insurance Co. vs. Hodgeson, 7 Cranch, 332.
United States vs. Throckmorton, 98 U. S. 61.
Barrow vs. Hunton, 99 U. S. 80.
Johnson vs. Waters, 111 U. S. 640, 667.
Chicago, R. I. & P. Ry. Co. vs. Callicotte, 267 Fed. 799, 802, C. C. A. 8th Cir.
Graver vs. Faurot, 76 Fed. 257, 263.

Marshall vs. Holmes, 141 U. S. 589, 599.
Simmons vs. Southern Railway Company, 236 U. S., 115, 126, 7, 8.
Wells Fargo & Co. vs. Taylor, 254 U. S. 175.
Ocean Insurance Co. vs. Fields, 2 Story, 59, 18 Fed. Cas. p. 532.
Sayers vs. Burkhardt, 85 Fed., 246 C. C. A. 4th Ct.
Dowagiac Mfg. Co. vs. McSherry Mfg. Co., 155 Fed., 524, C. C. A. 6th Ct.
Hendryx vs. Perkins, 114 Fed., 801, 809, C. C. A. 8th Ct.
Young vs. Sigler, 48 Fed. 182, Shiras & Woolsen JJ.
Guild vs. Phillips et al, 44 Fed. 461, Newman J.

This power exists in the District Court even in those cases in which the original case is in an appellate court upon appeal or proceedings in error taken from a judgment of the very district court in which the bill is filed.

Upon such a bill, the Court in which it is pending may grant an injunction at any time; the fact that an appeal or writ of error from the fraudulent judgment is pending in a higher court, and that the appellate jurisdiction of the latter has therefore attached, does not affect the right of the party to file a bill, or of the Court to grant an injunction.

Parker vs. The Judges, 12 Wheat., 561.
Dowagiac Mfg. Co. vs. McSherry Mfg. Co., 155 Fed., 524, C. C. A. 6th Ct.

A circuit court of appeals or other appellate court cannot grant relief by way of bill of review or otherwise on the ground of extrinsic fraud of the successful party in the court below.

Dowagiac Mfg. Co. vs. McSherry Mfg. Co., 155 Fed., 524, C. C. A. 6th Cir.
Hendryx vs. Perkins, 114 Fed., 801, 807, 809.
Hill vs. Phelps, 101 Fed. 650, C. C. A. 8th Cir.
Simpkins "A Federal Equity Suit", p. 607.
2 Beach, Modern Equity Practice, Sec. 884.
Daniells' Chancery Pleading and Practice, (5th Ed.), p. 1584.
1 Story Equity Pleading, Sec. 404.

A suit to enjoin enforcement of a judgment for extrinsic fraud of the successful party in obtaining it may be brought and maintained without leave of any court.

Hendryx vs. Perkins, 114 Fed., 801, 807, 809.
Dowagiac Mfg. Co. vs. McSherry Mfg. Co., 155 Fed. 524, C. C. A. 6th Cir.
Ritchie vs. Burke, 109 Fed., 16.
Griggs vs. Gear, 8 Gillman, 3.
Farwell vs. Great Western Telegraph Co., 161 Ill., 522, 617.

It necessarily follows from the foregoing that, a suit having been brought in a district court praying for relief by way of injunction against the enforcement

of a judgment or decree which plaintiff claims was obtained by extrinsic fraud, the district court has full jurisdiction to examine the bill of complaint and to determine for itself whether the facts alleged constitute a ground for the relief prayed for. The district court may decide this question rightly or it may decide it wrongly, but its decision, right or wrong, is binding upon the parties before it until it is reversed by some other court having direct supervisory control over the district court which made the order. If the district court in such a case is in error in holding that the bill states grounds for equitable relief, the defendant has a plain and adequate remedy by appeal. The defendant cannot, in such case, by proceedings in mandamus or prohibition either in the Circuit Court of Appeals of the Circuit or in the Supreme Court, or otherwise, control the discretion of the district court in its decision of the question presented in such a bill of complaint. Neither mandamus nor prohibtion will lie where there is a plain and adequate remedy by way of appeal.

Ex parte Chicago, Rock Island and Pacific Ry. Co. 255 U. S. 273.

In the case last above cited this court, speaking by Mr. Justice Brandeis said:

> "The immunity of the Rock Island from suit in the Northern District of Ohio, conferred by Sec. 51 of the Judical Code, could be waived, *In re Moore,* 209 U. S. 490; and ordinarily a general appearance operates as a waiver. *Gracie v. Palmer,* 8 Wheat 699. The District Court obviously had jurisdiction to determine, in the

first instance, whether the Rock Island had entered a general appearance. *Jones v. Andrews,* 10 Wall. 327. It had jurisdiction also to determine whether the relief sought in the Toledo Company's cross-bill was in its nature germane to the proceedings theretofore instituted in the suit by the bondholders' committee or by the Central Trust Company, so that the rights asserted in the cross-bill could be properly litigated in that suit. *Chicago, Milwaukee & St. Paul Ry. Co. v. Third National Bank of Chicago,* 134 U. S. 276, 287. And finally, it had jurisdiction to determine whether the fact that such earlier proceeding had been instituted on behalf of the Rock Island, that it had actively participated in the conduct thereof, and to that end had entered a general appearance, made it subject to further proceedings thereon by way of cross-bill, as fully as if the earlier action had been taken in its name as well as on its behalf. Compare also *Ex parte Gordon,* 104 U. S. 515; *Globe Refining Co. v. Landa Cotton Oil Co.,* 190 U. S. 540; *In re Pollitz,* 206 U. S. 323. If in the judgment of the Rock Island the District Court erred in the decision of any one or all of these questions it will have its remedy by appeal, unless it has failed to preserve by appropriate procedure that right of review. The same considerations lead to a denial also of the writ of mandamus. *Ex parte Roe,* 234 U. S. 70.

In the case of *Huntington* vs. *Laidley,* 176 U. S. 668, at page 679, the court, speaking by Mr. Justice Gray, said:

"The present suit seeks to charge the whole

> tract with a trust in favor of the plaintiff as receiver of the Central Land Company. Under the circumstances of this case, the question whether the proceedings in any or all of the suits, at law or in equity, in the state court, afforded a defense—either by way of *res adjudicata,* or because of any control acquired by the state court over the subject matter—to this bill in the Circuit Court of the United States, was not a question affecting the jurisdiction of that court, but was a question affecting the merits of the cause, and as such to be tried and determined by that court in the exercise of its jurisdiction. The Circuit Court of the United States cannot, by treating a question of merits as a question of jurisdiction, enable this court, upon a direct appeal on the question of jurisdiction only, to decide the question of merits, except in so far as it bears upon the question whether the court below had or had not jurisdiction of the case."

The case just quoted, we submit, shows beyond all question that the Circuit Court of Appeals for the Seventh Circuit was wrong in holding that the question as to whether the District Court in Ohio had properly held that the proceedings in the Seventh Circuit were not *res judicata* was a jurisdictional question, and in holding that since, in the view of the Circuit Court of Appeals, the District Court in Ohio decided this question erroneously, therefore its decision was a nullity. The case cited shows that the question is one on the merits and does not go to the jurisdiction of the court at all.

It would seem necessarily to follow that if a district court may entertain and decide for itself the issues presented by a bill for injunction to restrain enforcement of a judgment or decree which is then pending in the court of appeals immediately above it or in the Supreme Court (as was the case in *Dowagiac Mfg. Co. vs. McSherry Mfg. Co.*, 155 Fed., 524, C. C. A., 6th Ct., and *Parker vs. The Judges*, 12 Wheat., 56.) that it would be free to entertain and determine for itself the issues presented by such a bill with respect to a judgment entered by a district court of another Circuit, even though an appeal from such judgment were pending in the circuit court of appeals of such other circuit. The result in the case at bar, to date, however, establishes that such a circuit court of appeals in another circuit has a power which the circuit court of appeals immediately over the district court and the Supreme Court itself has not. The Circuit Court of Appeals for the Seventh Circuit has assumed the right to examine the proceedings in the District Court in Ohio and has taken the position that, since it disagrees with the conclusion of the District Court in Ohio that the bill of complaint in the District Court in Ohio states a cause of action for equitable relief, it may ignore and treat as a nullity the decision of the District Court in Ohio denying the motion to dismiss that bill and granting the preliminary injunction upon it, and may direct exactly the opposite relief to that which the District Court in Ohio has ordered.

That It Had Jurisdiction To Enjoin The Proceedings In The District Court In Ohio, Or To Penalize Toledo Company For Bringing The Ohio Suit.

A complete answer to the claim that the Court of Appeals could properly enjoin the Ohio proceedings is found in the opinion of the Court in *Kline v. Construction Company et al,* decided November 20, 1922, Opinion by Mr. Justice Sutherland, (43 Supreme Court Reporter 79, Dec. 15, 1922), in which it is said:

> "But a controversy is not a thing and a controversy over a mere question of personal liability does not involve the possession or control of a thing and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of *res adjudicata by the court in which the action is still pending in the orderly exercise of its jurisdiction,* as it would determine any other question of fact or law arising in the progress of the case. The rule, therefore, has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, *another action for the same cause in another jurisdiction is not precluded."* (Citing and quoting from authorities). *"Prior to the decision in*

the instant case, as an examination of the foregoing authorities and others which might be added will show, the rule was firmly established that the pendency in a Federal court of an action in personam was neither ground for abating a subsequent action in a State court, nor for the issuance of an injunction against its prosecution. * * * * The well established rule to which we have referred, that where the action is one *in rem*, that court—whether State or Federal—which first acquires jurisdiction draws to itself the exclusive authority to control and dispose of the *res*, involves the conclusion that the rights of the litigants to invoke the jurisdiction of the respective courts are of equal rank. See *Heidritter v. Elizabeth Oilcloth Co.*, 112 U. S. 294, 305. The rank and authority of the courts are equal, but both courts cannot possess or control the same thing at the same time and any attempt to do so would result in unseemly conflict. The rule, therefore, that the court first acquiring jurisdiction shall proceed without interference from a court of the other jurisdiction, is a rule of right and of law based upon necessity and where the necessity, actual or potential, does not exist, the rule does not apply. Since that necessity does exist in actions *in rem* and does not exist in actions *in personam* involving a question of personal liability only, the rule applies in the former but does not apply in the latter."

The granting of the injunction in the Ohio case which is still pending precluded the granting of contrary relief in any other Federal Court.

Louisville & Nashville R. R. Co., v. Telegraph Co., 250 U. S. 363, 368.

These decisions effectually dispose of the contention that the Circuit Court of Appeals for the Seventh Circuit had any rightful jurisdiction to enjoin the proceedings in the District Court in Ohio.

A case which makes very clear the reason why an injunction against the enforcement of a decree could properly be issued by the District Court in Ohio, while at the same time an injunction against the further prosecution of the suit in Ohio could not properly be issued by the Circuit Court of Appeals, is *Essanay Film Mfg. Co. vs. Kane,* decided by this court April 10, 1922, appearing at page 318 of the Supreme Court Reporter for May 15, 1922. In that case this court, speaking by Mr. Justice Pitney, said:

> "In this court, as in the courts below, appellant's chief reliance is upon Simon v. Southern Railway, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492. Without intimating that in other respects the cases are parallel, it is a sufficient ground of distinction that this is an attempt to use the process of the federal court to restrain further prosecution of an action still pending in a state court, while that cited was a case of enjoining a successful litigant from enforcing a final judgment of a state court held void because procured without due process. As was pointed out in that case (236 U. S. 123 et seq., 35 Sup. Ct. 255, 59 L. Ed. 492), the prohibition originated in the Act of Congress of March 2, 1793, 1 Stat. 334, c. 22, Sec. 5, was based upon principles of comity, and designed to avoid inevitable and irritating conflicts of jurisdiction. But when the litigation in the state court has

> come to an end and final judgment has been obtained, the question whether the successful party should in equity be debarred from enforcing the judgment, either because of his fraud or for the want of due process of law in acquiring jurisdiction, is a different question, which may be passed upon by a federal court without the conflict which it was the purpose of the act of 1793 to avoid."

It seems to have been the theory of the Computing Company as petitioner in the Circuit Court of Appeals and of that court, that that court could entertain the petition to enjoin the proceedings in Ohio: (a) Because of the claim that the Ohio suit is a mere vexatious attempt to relitigate the issues which were before the courts in the Seventh Circuit; and (b) Because the litigation in Ohio interferes with the exercise by the Circuit Court of Appeals for the Seventh Circuit of its appellate jurisdiction in the litigation in that Circuit.

These conclusions, it is respectfully submitted, were both erroneous. A mere statement of the issues involved in the two cases, respectively, demonstrates that the suit in Ohio presents an entirely different issue from that which was or could have been presented under the pleadings filed in the District Court for the Northern District of Illinois, Eastern Division, and reviewed by the Circuit Court of Appeals for the Seventh Circuit on Appeal.

The Illinois litigation presented the ordinary

issues found in a suit for infringement of a patent. Questions of patentability, priority, infringement and accounting for profits were the only issues which were or could have been raised and determined under the pleadings in that suit.

The Ohio litigation alleges a conspiracy upon the part of the Computing Company to ruin the Toledo Company for the purpose of eliminating it as a competitor in interstate commerce and that as a detail in carrying out this conspiracy the Computing Company perpetrated a fraud upon Toledo Company and upon the courts in the Seventh Circuit by secretly acquiring and suppressing all of the tangible evidence which there was in existence which would have afforded Toledo Company a defense to the Illinois litigation and by various devices arranged for the silence of persons who could have given testimony as to the existence of such evidence, and that because of the fraud the Computing Company was successful in obtaining the decree against Toledo Company in the Illinois litigation. While of course it is true that in the Ohio litigation the District Court had to look at the record in the Illinois litigation to ascertain whether the suppressed and secreted evidence would or should have affected the result in that litigation had it been there available, yet it had to do this not for the purpose of redetermining any of the issues which were before the Illinois Court or of attempting to determine whether these issues were rightly decided on the record before the Illinois Court. The only purpose for which the District Court

in Ohio had to examine the Illinois record was to determine whether the fraud alleged was such as materially affected the result of the Illinois litigation.

The District Court in Ohio, because of the insistence of the Computing Company, went farther than this, and in fact examined the record in the Illinois litigation to determine whether the questions presented to it were different from those which had been presented by certain discretionary applications made to the Circuit Court of Appeals in the Seventh Circuit and found that even these discretionary applications did not present the questions or raise the issues which were presented by the bill of complaint in Ohio. In so doing, we submit, the District Court in Ohio went out of its way to observe the comity due from one court to another. Even had it been true, as contended by the Computing Company, that the applications made by Toledo Company to the Circuit Court of Appeals for the Seventh Circuit for leave to request the District Court to reopen the case and receive newly discovered evidence, had in fact embodied the very claim of fraud which was presented by the bill of complaint in Ohio, the District Court in Ohio would nevertheless have been at liberty to proceed to entertain that bill of complaint, and this for two reasons.

1. The Circuit Court of Appeals would have had no jurisdiction to entertain a bill of review based upon the fraud of the successful party in secreting and suppressing evidence to support the defeated party's defense.

Dowagiac Mfg. Co. vs. McSherry Mfg. Co., 155 Fed., 524, C. C. A. 6th Cir.
Hendryx vs. Perkins, 114 Fed. 801, 807, 809.
Hill vs. Phelps, 101 Fed. 650, C. C. A. 8th Cir.
Simpkins "A Federal Equity Suit," p. 607.
2 Beach, Modern Equity Practice, Sec. 884.
Daniell's Chancery Pleading and Practice (5th Ed.), p. 1584.
1 Story Equity Pleading, Sec. 404.

The same principle is applicable here as that applied by this court in *Standard vs. Missouri,* 224 U. S. 270, 281, in which it was said:—

> "Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by the law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for a libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will * * *. The judgments mentioned, given in the cases supposed, would not be merely erroneous they would be absolutely void; because the court in rendering them would

> transcend the limits of its authority in those cases. Windsor vs. McVeigh, 93 U. S. 274, 282."

In like manner, if a court, and particularly a court of purely appellate jurisdiction, such as a Circuit Court of Appeals, in a case in which the issues presented by the pleadings were merely questions involving the validity and infringement of a patent and the profits of the infringer, should undertake to find that the plaintiff was a party to a conspiracy and had defrauded the defendant in pursuance of it, or if it should undertake to decide that the plaintiff was not a party to a conspiracy and had not defrauded the defendant in pursuance of it, its decision in either event would "transcend the limits of its authority * * *" and consequently, as held in the case last cited, "would be absolutely void." Even had the Circuit Court of Appeals attempted to pass upon this question of fraud in the discretionary applications which were made to it, and even had the District Court in Ohio so found, it would still have been fully justified in issuing the injunction which it did issue.

2. As above suggested, the applications which were made to the Circuit Court of Appeals with respect to leave to apply to the lower court to receive newly discovered evidence were applications purely to the discretion of the Circuit Court of Appeals. If Toledo Company at the time of making such applications had known of the fraud which had been perpetrated upon it by the Computing Company, and had set forth this fraud in these applications in an effort to move the

discretion of the Circuit Court of Appeals to permit the newly discovered evidence to be received, and if the Circuit Court of Appeals had in fact then attempted to pass upon the questions of materiality of such fraud and had held against Toledo Company thereon, its decision would still have been purely discretionary and would not have been binding upon Toledo Company as *res judicata* or estoppel in its subsequent suit filed as a matter of right to restrain the enforcement of the judgment because of fraud.

Metcalfe vs. Williams, 104 U. S. 95.
Oklahoma City vs. McMaster, 196 U. S. 529, 533.
Bucki vs. Atlantic Lumber Co., 116 Fed. 1, C. C. A., 5th Cir.
Freeman on Judgments, Vol. 2, Sec. 511.
Farwell vs. Great Western Telegraph Co., 161 Ill., 522, 617.
Credits Commutation Co. vs. United States, 177 U. S. 311.

It seems clear that a discretionary application to an appellate court, supported only by such affidavits as the applicant may be fortunate enough to obtain and which that court may grant or deny in its wholly uncontrolled discretion, cannot, if denied, have the effect of adjudicating finally as between the parties that the fraud alleged was not committed or was immaterial or that relief against it is barred by laches. A party who is defrauded has a right to a hearing in a court where he can subpoena witnesses and force them to

testify whether they are willing to do so or not, and to have the issues determined in accordance with the rules of law and equity with a right of review if he feels aggrieved by the decision. Toledo Company has never had a day of this kind in court.

The orders denying the discretionary applications to the Circuit Court of Appeals were not final decrees and only a *final* decree amounts to *res judicata.*

Merriam Company vs. Saalfield et al., 241 U. S. 22-27.

Moreover, it should not be overlooked that the fraud of which Toledo Company now complains was not in fact known to it and hence was not set up or relied upon in its appeals to the discretion of the Circuit Court of Appeals and that the fraud was still operative at the time of these applications and prevented Toledo Company's making the full showing with respect to prior use and any showing as to fraud such as is now made in the District Court in Ohio.

Obviously a decree which it is claimed was obtained by fraud cannot operate as a bar to an investigation of the fraud.

Adair v. Cummins, 48 Mich. 375-378-379, 12 N. W. 495.
Walker v. Day, 8 Baxt. Tenn, 77-82.

And by a parity of reasoning a party whose only relief against a judgment obtained by fraud is a suit to enjoin its enforcement cannot be guilty of contempt of

court in filing his suit for such an injunction. He is entitled to a day in court on his charge of fraud without danger of punishment for contempt of court, even though he ultimately fail to make his case.

It is respectfully submitted that the litigation in Ohio in no respect interferes with the exercise by ~~of~~ the Circuit Court of Appeals for the Seventh Circuit of its appellate jurisdiction in the litigation in that Circuit.

The Circuit Court of Appeals is a Court of purely appellate jurisdiction. If it has power to issue or to direct the District Court below to issue an injunction with respect to a matter, it may do so only, if at all, by virtue of the provision of Section 262 of the Judicial Code authorizing the Supreme Court, the Circuit Court of Appeals and the District Courts "to issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and the principles of law." The issuance of injunctions is specifically provided for by Section 264 of the Judicial Code and provision is there made for the issuance of injunctions by the Supreme Court and the Justices of the Supreme Court, by the District Courts and by the Judges of the District Courts and by the Circuit Judge in the absence or disability of the District Judge "in any case pending in the District Court." The specific provisions do not authorize the issuance of injunction by the Circuit Court of Appeals. Probably they have no such power.

North Bloomfield vs. United States, 83 Fed. 2 (C. C. of A. 9th Ct.)
The Mamie, 110 U. S. 742.
M'Clung vs. Silliman, 6 Wheat 598, 601.

If it be granted, however, that they may issue them when so "necessary" for the exercise of their appellate jurisdiction, nevertheless, if that Court erroneously determines that a necessity exists when it does not exist, such determination should be reviewed and reversed by the Supreme Court. In the case at bar we submit it is clear that there was no necessity for the Circuit Court of Appeals to issue an injunction in aid of its appellate jurisdiction. All that remained for it to do to fully complete the exercise of its appellate jurisdiction in this case was to send its mandate to the District Court affirming the decree upon the accounting. When that had been done, its exercise of its power and authority would have been complete.

Apparently the Circuit Court of Appeals doubted its own authority to issue an injunction as prayed for by the petition of the Computing Company, and it therefore, instead of issuing an injunction itself, directed that its mandate should include a direction to the District Court for the Northern District of Illinois, Eastern Division to

> "enjoin Toledo Company from further maintaining its Ohio bill and from filing elsewhere any similar bill."

In the opinion of the Circuit Court of Appeals its right and power to direct this kind of mandate is based upon decisions in which this Court has held that District Courts had properly issued injunctions to restrain vexatious litigation in other courts, referring to *Kessler vs. Eldred,* 206 U. S. 285, and *Supreme Tribe of Ben Hur vs. Cauble,* 255 U. S. 356.

With reference to these cases the Circuit Court of Appeals say:

> "Cases last above cited involved ancillary proceedings in District Courts. But if the final decree had been removed to and was pending in a Court of Appeals, that Court would have not only exclusive jurisdiction of the questions presented on the record transmitted by the trial court, but also exclusive jurisdiction of ancillary questions presented by independent evidence and bearing upon the correctness and justice of the mandate to be entered. Has the issue decided by the trial court now become moot? Has the appellant so availed himself of the decree as to require the dismissal of his appeal? Has new evidence bearing on the issue been discovered on account of which equity demands that the decree be opened and a new trial had on evidence, including the new? Is the appellant privy to an adjudication in another Court which should bar the appeal? *Hart Steel Co. vs. Railroad Supply Co.,* 244 U. S. 294 and *National Brake Co. vs. Christensen,* 254 U. S. 425 are illustrations of the ancillary appellate jurisdiction." (Record p. 482.)

It will be observed that all of the instances given by the Circuit Court of Appeals of ancillary appellate

jurisdiction are those which go to affect the question as to whether the decree of the Court below should be affirmed or reversed. That is, as the Circuit Court of Appeals itself states, "bearing on the correctness and justice of the mandate to be entered." But these cases are far short of holding or even intimating that the Circuit Court of Appeals may entertain an ancillary application, and upon it issue a mandate directing the court below to take action upon matters which were never submitted to that court and which are entirely foreign to any issue which was ever litigated in the proceedings from which the appeal was taken.

The ordinary procedure, where it is claimed that vexatious litigation is being maintained by a defeated party, is to file a bill of complaint so alleging either as an ancillary bill in the District Court in which the original proceedings were had as in *Supreme Tribe of Ben Hur vs. Cauble, supra.*, or in some other District Court having jurisdiction of the parties, as in *Kessler vs. Eldred, supra.*, and upon such bill of complaint and after a hearing and determination that the other suit is vexatious the District Court may issue an injunction. In the case at bar the Circuit Court of Appeals has substituted itself for the District Court as a trial court, and upon a petition filed before it, which was never before the District Court, has held that its action upon prior applications to it, which in turn were never before the District Court, are binding upon the parties and has directed the issuance of a mandate to the District Court below it to issue an injunction upon a matter which that District Court has never had before it.

We respectfully submit that the Circuit Court of Appeals under the guise of informing itself "on the correctness and justice of the mandate to be entered" cannot substitute itself for a District Court and usurp the primary jurisdiction of that court in the manner in which it has been done in this case. If a Circuit Court of Appeals may upon the application of one party turn an appeal involving only the questions of the validity and infringement of a patent and of how much one party shall pay to the other as profits for an alleged infringement into a suit to enjoin the maintenance of alleged vexatious litigation in another circuit, then it would be equally entitled in action for a libel or personal tort to entertain a petition and direct the issuance of a mandate for the specific performance of a contract, or, in an action upon a money demand, pass judgment of imprisonment upon the defendant. This court in *Standard Oil Co. vs. Missouri,* 224 U. S. 270-281 has held that a District Court could not exercise the powers just suggested, and certainly, if the District Court cannot, a Circuit Court of Appeals cannot.

It should further be noted that in the case at bar the Circuit Court of Appeals has not only directed the issuance of an injunction by the District Court, but has directed the District Court to

> "ascertain Computing Company's expenses in this matter, including reasonable attorneys' fees paid or incurred since the Supreme Court's denial of the petition for writ of certiorari on January 9, 1922, and enter summary decree therefor against Toledo Company." (Record p. 488.)

The Circuit Court of Appeals has not stated in terms that it has found the Toledo Company guilty of contempt, but it has attempted to punish it as for a civil contempt. It heard no evidence as to the good faith or lack of it on the part of Toledo Company in beginning the suit in Ohio. The District Court in Ohio not only held that the suit was brought in good faith but that it was well founded after full hearing upon the motion for preliminary injunction, but nevertheless a summary decree is ordered by the Circuit Court of Appeals as above stated.

The action of Toledo Company in bringing the Ohio suit was not in contempt of the Circuit Court of Appeals. *Royal Trust Co.* vs. *Washburn, etc.,* 139 Fed. 865 (C. C. of A. 7th Ct.).

It seems to us that the District Court in Illinois might be somewhat astonished, if such a mandate came down to it, to find that a suit for infringement of a patent and accounting of profits had, while upon appeal, been converted into a suit to enjoin vexatious litigation, and that it is to issue an injunction without ever having had any hearing, and is to ascertain the amount of and enter a summary decree against one party for the other party's attorneys' fees without ever determining or even being informed by the Circuit Court of Appeals why this drastic punishment is imposed.

We believe that the mandate ordered by the Circuit Court of Appeals in this case is unique and we respectfully submit that it constitutes an assumption of jurisdiction which is destructive of the entire theory

upon which the Federal system of Courts rests and that it is an attempted exercise of power clearly otuside of the lawful jurisdiction of the Court.

III. The District Court in Ohio Was Right in Granting The Injunction

A. A PARTY WHO OBTAINS A JUDGMENT OR DECREE BY EXTRINSIC FRAUD MAY BE ENJOINED FROM ENFORCING SUCH JUDGMENT OR DECREE BY ANY COURT OF EQUITY HAVING JURISDICTION OF THE PARTIES

Briefly stated, the claim of Toledo Company asserted in its bill of complaint and corroborated by the affidavits in the District Court in Ohio, is that in pursuance of an unlawful conspiracy in restraint of trade and in the effort to destroy the competition offered by Toledo Company, in the scale business, the Computing Company brought a suit upon the Smith Reissue Patent No. 11536, which it then knew was an invalid patent because of the prior manufacture and long continued public use of the Phinney scale embodying the same device, to-wit, a light weight paper covered indicating cylinder which the Smith patent purported to cover. That long before the Computing Company brought the suit in question it knew of the existence and long continued use of the Phinney scales and, for the express purpose of depriving the Toledo Company of the opportunity to acquire knowledge and to make proof of such long continued prior use of the Phinney scales, the Computing Company instituted a systematic search

for all of the Phinney scales which had come into commercial usage and was successful in finding and bringing into its possession or that of its counsel all of such scales so in use. That after acquiring said scales it secreted them and then brought the suit in the District Court for the Northern District of Illinois, Eastern Division, in which the decree against Toledo Company was obtained, with the express and fraudulent purpose of obtaining a decree holding the Toledo Company to be an infringer, and of obtaining an injunction and an accounting and a decree for the profits of the Toledo Company by reason of such alleged infringement. That the Computing Company carried out this plan in detail and was successful in keeping from the Toledo Company and from the District Court for the Northern District of Illinois, Eastern Division, all knowledge of the existence and prior usage of the Phinney scales until the decree in that district had been entered sustaining the Smith Reissue patent and finding the Toledo Company to be an infringer thereof and until an appeal from such decree had been perfected in the Circuit Court of Appeals for the Seventh Circuit. That by reason of these fraudulent acts of the Computing Company, Toledo Company was unable to and did not, notwithstanding diligent efforts upon its part, learn of the manufacture, use or existence of any scales made by said Phinney.

This conduct of the Computing Company constitutes extrinsic fraud as defined in the opinions of every

court which has ever had occasion to examine this subject, including the definition in the opinion of the Circuit Court of Appeals for the Seventh Circuit on the petition of the Computing Company in this cause. The result in this case cannot be reconciled with that Court's definition of extrinsic fraud or with an earlier opinion of the same court in the case of *Graver vs. Faurot,* 76 Fed. 257. In the earlier case it was held that the plaintiff could obtain relief in the Federal Circuit Court by injunction against the enforcing of a decree of a state court in equity upon allegations to the effect that plaintiff in the federal court had, as plaintiff in the state court, filed a bill charging the defendants with deceitful and fraudulent practices whereby he was defrauded, and demanded answer under oath. That defendant in the state court had answered under oath denying fraud; that plaintiff then had no means of learning the truth and consequently permitted a judgment on the merits to be entered against him without further contest, and that he had afterwards discovered the truth by reason of the subsequent insolvency of the bank, whereby its records and testimony of its officers became available. The case just mentioned is one which the Circuit Court of Appeals for the Seventh Circuit first certified to the United States Supreme Court for decision, and upon the Supreme Court's refusing to pass upon it (162 U. S. 435) the Circuit Court of Appeals for the Seventh Circuit rendered the opinion just mentioned.

The question as to the right of one against whom

a decree has been obtained by extrinsic fraud to obtain relief by an original bill for injunction was before the Court of Appeals for the Sixth Circuit in *Dowagiac Manufacturing Company vs. McSherry Manufacturing Company,* 155 Fed. 524, in which the third paragraph of the syllabus is as follows:

> "Fraud in obtaining a decree cannot be made the basis of a bill of review but only of an original bill to impeach the decree for fraud; the radical difference between the two kinds of bills being that a bill of review is a continuation of the original litigation, whereas a bill to impeach a decree for fraud is new and independent litigation."

In *United States vs. Throckmorton,* 98 U. S. 61, at page 65, the court said:

> "Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court; a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing. See Wells, Res Adjudicata, sect. 499; Pearce v. Olney, 20 Conn. 544; Wierich v. DeZoya, 7 Ill. 385; Kent. v. Ricards, 3 Md. Ch. 392;

Smith v. Lowry, 1 Johns. (N. Y.) Ch. 320; DeLouis et al. v. Meek et al., 2 Iowa 55.

"In all these cases, and many others which have been examined, relief has been granted, on the ground that, by some fraud practiced directly upon the party seeking relief against the judgment *or decree,* that party has been prevented from presenting all of his case to the court." (Italics are ours.)

In *Marshall v. Holmes,* 141 U. S. 589, 599, the Supreme Court again had occasion to consider the same subject and after reviewing a number of authorities made the following statement:

"These authorities would seem to place beyond question the jurisdiction of the Circuit Court to take cognizance of the present suit, which is none the less an original, independent suit, because it relates to judgments obtained in the court of another jurisdiction. While it cannot require the state court itself to set aside or vacate the judgment in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a state court. It would simply take from him the benefit of judgments obtained by fraud * * * .

"While the court, upon final hearing, would not permit Mrs. Marshall, being a party to the actions at law, to plead ignorance of the evidence introduced at the trial, it might be that relief could be granted by reason of the fact,

> distinctly alleged, *that some of the necessary proof establishing the forgery of the letter* was discovered after the judgments at law were rendered, and after the legal delays within which new trials could have been obtained, and could not have been discovered by her sooner * * *. The suit being, in its general nature, one of which the Circuit Court of the United States could rightfully take cognizance, it was for that court, after the cause was docketed there, *and upon final hearing,* to determine whether, under the allegations and proof, a case was made which, according to the established principles of equity, entitled Mrs. Marshall to protection against the judgments alleged to have been fraudulently obtained." (Italics are ours.)

It should be noted that relief was asked in *Marshall vs. Holmes* upon the ground that a document upon which the case of the plaintiff in the original case depended was forged in pursuance of a conspiracy and that knowledge of "some" of the necessary proof had not come to the plaintiff in the equity suit until after judgment had been rendered against her as defendant in the law action *in which she had denied that the document was valid.* Plaintiff in the equity suit sought relief upon the ground that the plaintiff's claim in the law action was unfounded and based upon false testimony and a false instrument which he had forged, just as here we claim that plaintiff's original case was unfounded and based upon a false claim with respect to the validity of a patent and a false history of the prior art, which false history it had created by extrinsic fraud.

The element of conspiracy is also in both cases.

The latest decision by the Supreme Court upon this subject is *Wells, Fargo & Company vs. Taylor,* decided December 6, 1920, 254 U. S. 175. In this case the Court reviews many of the authorities and holds that a judgment of a state court should be enjoined because of the perpetration of a "legal fraud" by the plaintiff in that case. The facts were that plaintiff was an express messenger, who sued a railroad company for injuries received by him while in an express car. He set up only a portion of the contract between the express company and the railroad company, omitting that portion of the contract by which the express company had agreed to indemnify the railroad company against all claims for damages asserted by the agents of the express company, and by which the plaintiff had released the express company from all such claims. *The express company attempted to intervene in the state court to set up its rights, but was refused leave.* The plaintiff in the state court obtained judgment against the railroad company, and it was held that his act in setting up only a part of his contract constituted the perpetration of a "legal fraud" on the express company, and

> "that the judgment is therefore one which in equity and good conscience he has no right to enforce."

The Supreme Court held that an injunction had been properly issued by the District Court restraining the enforcement of the judgment of the state court

against the railroad company. It seems clear that a far less flagrant case of fraud was presented in that case than that shown by the affidavits in the District Court in the Northern District of Ohio.

A case which contains a very full review of the authorities is a decision of the Circuit Court of Appeals for the Eighth Circuit in *Chicago R. I. & P. Ry. Co. vs. Callicotte,* 267 Fed. 799, 802. We direct the court's particular attention to this case, not only because of the review of the authorities which it contains, but also because of the fact that the fraud which the court there held required that enforcement of a judgment be enjoined was in principle closely analogous to that here. The fraud there was that a plaintiff in a personal injury case had feigned paralysis prior to the trial, in pursuance of a conspiracy between himself and others, and had so conducted himself as to prevent the defendant from learning the true facts as to his condition. The Court of Appeals said with respect to it:

> "We have here, therefore, a conspiracy by Callicotte and others (1) to prevent his true condition and the history of his case being known; (2) to swear falsely as to his condition and the history of his case; (3) to produce a false condition and fabricate a false history of the case as a basis for testimony by witnesses other than himself. This conspiracy was directed against the defendant, the defendant's witnesses, and certain of the plaintiff's own witnesses, and against the court, and jury. Its purpose was not merely to present a false case for plaintiff, but also to prevent the defendant

company from putting in its own case in defense. * * *

"The facts in the case at bar have been already stated, and the question arises wherein lay the fraud. Was it simply in the false testimony at the time of the trial that plaintiff was permanently paralyzed? By no means. The fraud consisted also in a concocted history of the case, to-wit, that plaintiff a few days after the accident became paralyzed, and remained so continuously thereafter up to the time of the trial, a period of more than six months. The continuance of the paralysis for a period of more than six months was one of the most important factors on which all of the medical men, both for plaintiff and defendant, based their conclusions. We may disregard the question whether at the several times of the examinations of plaintiff he was artificially paralyzed by drugs or feigned paralysis through self-control. We may even assume that he had true paralysis on these several occasions if possible, but the fact remains that in the intervals he had the use of his legs, and had been seen and known to use them, on many occasions. Yet this true history of the case was, by a conspiracy, concealed from the defendant; the false history of the case was given to the various doctors for the defendant; and even to one of the plaintiff's own doctors, either by the plaintiff himself, or by another of his doctors. On this false and fraudulent foundation these medical experts rested their conclusions. In other words, they were induced by trickery to testify directly opposite to what they would undoubtedly have testified had they known the truth. The jury was deceived; the court was deceived; the witnesses many of them were deceived—all by this conspiracy and fraud, a fraud consisting not

> merely in the testimony of plaintiff on the trial, but also in this concocted plan outside of court, pursuant to which a false history of the case was made up and proclaimed. By this fraud the witnesses for defendant, and one at least of the witnesses for the plaintiff, were led to give entirely different testimony from what they would have given but for this fraud. The examination tests on the plaintiff himself and the history of the case were the two main factors on which the experts rested their conclusion. Had these experts been caused to make tests on a real paralytic fraudulently substituted in place of plaintiff, no one woud hesitate to say that the fraud was extrinsic and collateral; yet to substitute a false history of the case in place of the true one, by deception and conspiracy, was equally an extrinsic and collateral fraud, and did 'not merely consist in false and fraudulent documents or testimony submitted to the tribunal and the truth of which was contested before it and passed upon by it,' as the rule was stated in the case of *Hilton vs. Guyot, supra.* In our judgment the facts take the case out of the rule announced in the Throckmorton case and restated in the Hilton case."

It is true of the case in the courts of the Seventh Circuit in which the Computing Company obtained the decree attacked in the court below that

> "the true history of the case was by a conspiracy concealed from the defendant; the false history of the case, was given to the various doctors" (expert witnesses) "for the defendant."

that,

> "on this false and fraudulent foundation these * * * experts rested their conclusions."

that,

> "In other words, they were induced by trickery to testify directly opposite to what they would undoubtedly have testified had they known the truth."

and that,

> "The court was deceived; the witnesses—many of them—were deceived, all by this conspiracy and fraud, a fraud consisting not merely in the testimony of the plaintiff on the trial but also in this concocted plan outside of court, pursuant to which a false history of the case was made up and proclaimed."

It should be noted in the case just cited that the suit for injunction was filed in the District Court while appeals were still pending in the Supreme Court of Missouri from the original judgment and also from the order denying a writ of error *coram nobis*, but by the time the case was submitted in the Circuit Court of Appeals the state court had denied relief upon the appeals and the Circuit Court of Appeals held that injunction should be granted by the District Court. Application to this court for a writ of certiorari was denied (255 U. S. 570).

We also direct particular attention to a decision on circuit by Mr. Justice Story, reported in 2 Story, 59, 18 Federal Cases, page 532, Case No. 10406, entitled *Ocean Insurance Company vs. Fields*. This case is of particular importance because of the fact that in an action upon an insurance policy the defendant had some suspicion of fraud upon the part of the plaintiff and claimed that plaintiff had cast away the vessel

for whose loss the suit was brought, but had no adequate proof. Subsequently it obtained proof to the effect that the plaintiff in the law action had bored holes in the bottom of the ship, and Justice Story held that this claim was sufficiently different from that which had been passed upon to justify the maintenance of an action in equity to enjoin judgment. In the course of the opinion Justice Story said:

> "Now the very reason upon which the present bill is founded is that this, a perfect and valid defense, at law, was by the fraudulent concealment of the defendant and the total ignorance of the plaintiffs in the facts, incapable of being set up to the original action; and the recovery was, therefore, inequitable and iniquitous. It would be against all the principles of a court of equity, to allow one party to practice a fraud upon another innocent party, and by another act of fraudulent concealment recover a judgment against him founded upon the prior act; and then to be permitted to assert this double iniquity as a bar to all equitable relief against the judgment."

Again Mr. Justice Story said,

> "But the parties admit, for the sake of the argument, that the point of fraud was made at the trial; but that it was in effect founded upon circumstances of suspicion, not sustained by any clear and satisfactory proofs; and that the boring of the holes was not known or suspected at the trial; and that it was not and could not therefore then be a matter of controversy. Now, I agree that mere cumulative evidence to the fact of fraud or any other leading fact not discovered since the trial, will not ordinarily

constitute any just ground for the interference of a court of equity to grant relief, for the solid reason that it is for the public interest and policy to make an end to litigation, or, as was pointedly said by a great jurist, that suits may not be immortal, while men are mortal. But I do not know that it has ever been decided, that, in an assignable case, where the defense has been imperfectly made out at the trial, from the defect of real and substantial proofs, although there were some circumstances of a doubtful character, or some presumptions of a loose and indeterminable bearing before the jury, and afterwards newly discovered evidence has come out, full and direct, and positive, to the very gist of the controversy, a court of equity will not interfere to grant relief and to sustain a bill to bring forth and try the force and validity of the new evidence. My recollection does not furnish me with any case, where a doctrine so strict and so binding has been positively upheld and pronounced. The disposition of courts of equity, upon this head, seems, as far as I can gather it, not to encourage new litigation in cases of this sort; but, at the same time, not to assert their own incompetency to grant relief, if a very strong case can be made out. *A fortiori* all reasoning upon such a point must be powerfully increased in strength when it is applied to a case which, upon the face of the bill, is composed and concocted of the darkest ingredients of fraud, if not of crime. At all events, it would be an extraordinary course for a court of equity to pronounce such a judgment in such a case, upon a demurrer, rather than to retain it for a final adjudication upon a hearing of the merits, where the full pressure of the

> whole facts, and the weight of all the attendant circumstances known at the trial and discovered since, may be fully brought before it. While the court would not be disposed lightly to interfere with the verdict of the jury, upon the point of fraud, it might well deem itself at liberty to look deeper into the case upon new evidence which might justly, if known at the time, have changed the verdict of the jury."

Other cases to which we direct the court's attention as being clearly in point are

> Sayers v. Burkhardt, 85 Fed. 246 (C. C. A. 4th Ct.).
>
> Young v. Sigler, 48 Fed. 182, a decision by Shiras J., concurred in by Woolson J.
>
> Guild v. Phillips et al, 44 Fed. 461, Opinion by Newman J.

While the Circuit Court of Appeals for the Seventh Circuit held that our pleading in the Ohio suit did not allege facts showing that the Computing Company had been guilty of extrinsic fraud (Opinion Record p. 485), nevertheless that court in undertaking to define what is intrinsic fraud and what is extrinsic fraud gave a definition of intrinsic fraud which does not at all fit the facts alleged in the Toledo Company's complaint, and gave a definition of extrinsic fraud which exactly fits those facts. The Court of Appeals said that intrinsic fraud

> "is any fraudulent conduct of the successful party which was practiced *during the course of an actual adversary trial of the issues joined*

> and which had no effect directly and affirmatively to mislead the defeated party to his injury after he announced that he was ready to proceed with the trial." (Record p. 484.) (Italics are ours.)

The fraud of which Toledo Company complains in the Ohio suit is not fraud which was practiced "during the course of an actual adversary trial of the issues joined." The bill of complaint alleges:

> "Plaintiff herein as defendant in said suit was, by reason of the acts of The Computing Scale Company, plaintiff therein, unable to and did not raise any issue in the evidence as to the prior manufacture and use of scales under said Phinney patent with a cylinder of light weight skeleton construction and was unable to and did not offer any evidence contesting the claims of The Computing Scale Company that there never had been any such manufacture and use." (Record p. 262.)

The fraud upon which the Ohio injunction suit rests is that *before the patent litigation was begun* the Computing Company, for the purpose of preventing an adversary trial of the issues as to whether there had been an anticipation of its patent, gathered up and secreted the evidence bearing upon this point, and that it did this for the express purpose of depriving the Toledo Company of the opportunity of having an actual adversary trial of the issue as to whether Smith or Phinney made the first light weight computing cylinder and for the express purpose of deceiving and misleading the courts as well as the Toledo Company. This conduct

certainly was not conduct "practiced during the course of an actual adversary trial of the issues joined."

The Circuit Court of Appeals' definition of extrinsic fraud on the other hand exactly fits the conduct of the Computing Company complained of by Toledo Company in the present case. That court says that extrinsic fraud is

> "any fraudulent conduct of the successful party which was practiced *outside of an actual adversary trial* (*if there ever was one*) and which was practiced directly and affirmatively on the defeated party (or his agents, attorneys or witnesses) whereby he was prevented from presenting fully and fairly his side of the case." (Record p. 484.) (Italics are ours.)

The Circuit Court of Appeals for the Seventh Circuit gives certain examples of what would be extrinsic fraud, saying,

> "If the successful party * * * kidnaps his (opponent's) witnesses, * * * he is guilty of fraud, and inasmuch as the fraud is extrinsic, that is a fraud not practiced upon the trial court, and the opponent during the course of an actual adversary trial of the controversy between the parties, *any court of equity has power to annul the decree so obtained.*" (Record p. 484. (Italics are ours.)

In the patent suit in the Illinois District Court Toledo Company was prevented by the fraudulent conduct of the Computing Company from fully and fairly presenting its side of the case. The issue presented by the bill of the Computing Company and the answer of

Toledo Company was whether Smith was the discoverer and inventor of the light weight computing cylinder for automatic scales. Under the rulings of the courts of the Seventh Circuit there was only one possible defense on the facts to the Computing Company's claim based on the Smith patent, and that defense was the prior manufacture, sale and use of the Phinney scale. By the conduct of the Computing Company "outside of the trial" (in fact, before the suit was begun) Toledo Company was prevented from learning of and presenting the evidence of this sole defense. The way the Computing Company prevented Toledo Company from learning of and presenting the evidence of this sole defense was by "kidnapping" not witnesses but exhibits, to-wit, the Phinney scales, and suppressing them, and buying the silence of witnesses. Koehne says he was under express obligation to say nothing about the suppression of the scales; Smith, the inventor, was kept under employment until the date his patent expired; and Church & Church, although not parties to the conspiracy, were kept on retainer and hence under professional obligation, preventing their speaking. We submit that it makes no difference whether the successful party kidnaps the witness and thus prevents the opposing party from presenting his evidence, or whether the successful party steals or borrows or purchases the only existing *exhibits* which will defeat his claim, and thus prevents the opposing party from presenting the evidence offered by such exhibits, or pays the witness to keep his knowledge to himself and thus prevents the

other party from learning of it. We respectfully submit that the fraud complained of in the District Court in Ohio was extrinsic, such as authorized the filing by Toledo Company of an original bill.

B. THE GENERAL RULE APPLIES TO ENJOINING THE ENFORCEMENT OF A DECREE ON THE MERITS IN A PATENT SUIT OBTAINED BY EXTRINSIC FRAUD BY AN ORIGINAL BILL IN ANOTHER COURT OF EQUITY

The decree of a court of equity is operative upon the parties before it. If the court is appealed to to prevent the consummation of a fraud it operates by order of injunction issued against the party who has been guilty of the fraud. If the fraud is in obtaining a deed the court may enjoin the grantee from reconveying or incumbering the property. If the fraud is in obtaining a note the court may enjoin the holder from enforcing or transferring it. If the fraud is extrinsic fraud in obtaining a judgment or decree the court may enjoin the party guilty of the fraud from enforcing or otherwise seeking to take any advantage or gain any benefit from the judgment or decree. In the latter case the court issues no order against the court or its officers in which the judgment or decree was entered. It does not review or reverse the proceedings in that court and does not vacate or set aside the judgment or decree. Its order as in the other cases abovementioned operates only upon the party and restrains

the party from enforcing or taking any advantage of the judgment or decree obtained by such fraud. These are well settled principles and are laid down in substantially all of the cases cited in the preceding section of this brief. The Circuit Court of Appeals for the Seventh Circuit, however, in its opinion takes the position that because the suit in that circuit was a patent suit and hence within the exclusive jurisdiction of the federal courts, and because the fraud of the Computing Company operated to prevent Toledo Company from showing that the Smith patent had been anticipated by Phinney (thus affecting the decision on the merits of the case), that therefore a suit cannot be maintained to enjoin the enforcement of the decree rendered in that suit in any other court, because if such suit could be elsewhere maintained it might be maintained in a state court which, in such event, as the Circuit Court of Appeals says,

> "would have equal authority to entertain the bill, find fraud in the procurement of the original decree of validity and then finally adjudge invalidity." (Record p. 483.)

and they say therefore that even though the present injunction suit is in a court which

> "has general jurisdiction to decide the issue of the validity of a patent" (Record p. 483)

it cannot be maintained.

It seems to us that there is an obvious fallacy in this reasoning. The court in which the injunction suit is planted, whether state or federal, will not be called upon to "adjudge invalidity" of the Smith patent.

What it will be called upon to do is to say whether the adjudication in the Seventh Circuit that the Smith patent is valid was obtained by extrinsic fraud of the Computing Company. If that adjudication *was* obtained by such fraud, then, whether the Smith patent is ultimately held to be valid or invalid in a tribunal having jurisdiction to pass upon that question, the particular decree obtained in the Seventh Circuit ought not to be used to the advantage of the party by whose fraud it was obtained.

The Supreme Court has had occasion to consider the question as to whether the enforcement of a judgment or decree obtained by extrinsic fraud in a court having exclusive jurisdiction of the subject matter before it, could be enjoined by another court of equity having no jurisdiction of the subject matter of the original suit.

In *Arrowsmith vs. Gleason,* 129 U. S. 86, the Supreme Court said: (Syl.)

> "Other conditions of jurisdiction being satisfied a Circuit Court of the United States has jurisdiction in equity to set aside a sale of an infant's lands fraudulently made by his guardian under authority derived from a probate court, and may give such relief therein as is consistent with equity."

This holding was not upon the theory that the United States Court had any probate power, which was recognized as being exclusively in the probate court, but on the theory that it had general equity power.

Upon this subject the court cited *Johnson vs. Waters*, 111 U. S. 640, 667, saying of that case (p. 99-100):

> "That was an original suit in the Circuit Court of the United States for the District of Louisiana. It was brought by a citizen of Kentucky against a citizen of Louisiana. Its main object was to set aside as fraudulent and void certain sales made by a testamentary executor under the orders of a Probate Court in the latter State. It was contended that the plaintiff was concluded by the proceedings in the Probate Court *which was alleged to have exclusive jurisdiction of the subject matter*, and that its decision was conclusive against the world, especially against the plaintiff, a party to the proceedings. This court, while conceding that the administration of the estate there in question properly belonged to the Probate Court, and that, in a general sense, the decisions of that court were conclusive and binding, especially upon parties, said: 'But this is not universally true. The most solemn transactions and judgments may, at the instance of the parties, be set aside or rendered inoperative for fraud. The fact of being a party does not estop a person from obtaining in a court of equity relief against fraud. It is generally parties that are the victims of fraud. The court of Chancery is always open to hear complaints against it, whether committed *in pais* or in or by means of judicial procedings. In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding in another court; but *it will scrutinize the conduct of the parties, and if it finds that they have been guilty of fraud in obtaining a judgment or decree it will deprive them of the benefit of it, and of any inequitable advantage*

which they have derived under it'—citing *Story's Eq. Jur.* Sec. 1570-1573; *Kerr on Fraud and Mistake,* 352-353; *Gaines vs. Fuentes,* 92 U. S. 10; *Barrow vs. Hunton,* 99 U. S. 80." (Italics are ours.)

We respecfully submit that the attempt of the Circuit Court of Appeals for the Seventh Circuit to classify fraud as intrinsic or extrinsic according to whether it does or does not operate to affect the merits of a judgment or decree is not sustained by any authority, and is contrary to every authority upon the subject.

C. THE GENERAL RULE APPLIES TO ENJOINING THE ENFORECMENT OF A JUDGMENT OR DECREE OF ONE FEDERAL COURT BY ANOTHER FEDERAL COURT

It is clear upon principle that a judgment or decree of a federal court obtained by extrinsic fraud is no more immune from attack than is the judgment or decree of any other court. The ground of attack is not in any case affected by the character of the court, or the power of the court, or the dignity of the court, or the jurisdiction of the court. The fact that a party has chosen a *federal* court to be the unwitting instrument by which his fraudulent design is consummated gives him no immunity from attack. The high character and dignity of the court upon which he has imposed afford him no cloak to cover his fraud. The indisputable presumption is that the court, whether federal or state, in which the judgment or decree was rendered decided the issues properly *upon the record as presented to it.* The

injunction suit in nowise attacks the court or criticises its judgment or seeks to reverse its finding upon the facts as presented to it. On principle and reason it is clear beyond controversy that a court of equity, otherwise having jurisdiction, will not hesitate to grant relief regardless of whether the fraud was perpetrated upon a state court or a federal court. The authorities fully sustain our position.

In *Carver vs Jarvis-Conklin Mortgage Trust Co.*, 73 Fed. 9, 12, Judge Severens said:

> "It does not matter in what court the fraudulent decree or judgment has been obtained, *whether state or federal;* suit may be brought in either of such courts to impeach it provided always the suit is in other respects within its jurisdiction. *Barrow vs. Hunton,* 99 U. S. 80; *Johnson vs. Waters,* 111 U. S. 640, 4 Sup. Ct. 619; *Marshall vs. Holmes,* 141 U. S. 589, 12 Sup. Ct. 62." (Italics are ours.)

In *Chapman & Co. vs. Montgomery Water Power Co.*, 127 Fed. 839, 842, the court said, Jones, J.:

> "The federal court in Rhode Island, finding the plaintiffs in this suit within its territorial jurisdiction, could at the instance of a citizen of another state and by decree operating *in personam,* charge the consciences of the plaintiffs in this suit, who are citizens of Rhode Island, with the duty not to proceed further in the litigation here and enjoin upon them not to do so, though the act forbidden to be done can be performed only in another jurisdiction and relates solely to their enforcement of a legal right in the United States Court in Alabama. *The federal court in Rhode Island and*

the federal court in Alabama having concurrent jurisdiction to enjoin the issue of execution in aid of the equity aserted by the Water Power Company, the Water Power Company could file its bill in the first instance either in this court as an ancillary proceeding or in the federal court in Rhode Island as an original proceeding. The restraining order made in Rhode Island does not attempt to control the action of this court or of any of its officers as to this judgment or to deal in any degree with the status of any res in the grasp of this court. It operates only in personam on the plaintiffs here. * * * It would be an unseemly spectacle for a court of justice here, if it has any discretion in the premises to permit a suitor to enforce in it a right which another court of co-ordinate authority, having jurisdiction of the subject matter and person, solemly forbade him to press here, when such decree violates neither the law nor policy of the domestic forum, nor injuriously affects the rights of suitors therein." (Italics are ours.)

In *Kirk vs. United States,* 124 Fed. 324, 340, Judge Ray held:

"It is contended by the defendants that the circuit court of the Northern District of New York cannot interfere by an injunction with the judgment of the court of the Eastern Division of the Southern District of Georgia as that is a court of co-ordinate or concurrent jurisdiction having equal power to grant the relief sought by injunction. * * * The complainant cannot be compelled in any such manner to go to the state of Georgia and into the District Court of the Eastern Division of the Southern District thereof and move there in that court to set

aside the judgment. He had no legal notice of the procedings which resulted in such judgment. In that action or proceeding he did not submit himself to the jurisdiction of that court, and it is not a case where the alleged defendant therein, the complainant in this action, is under any obligation whatever to proceed in that court. He has the right to invoke the protection of the Circuit Court of the United States in the district where he resides and where his property wrongfully and illegally levied upon and proposed to be sold is situated. *He has the right in district of his residence and where the subject matter of the litigation is situated to defend himself and his property against an unwarranted and an illegal seizure and sale of his real estate on process issued by the District Court in another state.* * * * The complainant in this action is under no obligation to lie still until his property has been sold and his title clouded. He may restrain in a court of competent jurisdiction all these illegal acts and prevent either a sale of his property or any act that will cloud the title." (Italics are ours.)

Judge Ray's judgment was affirmed by the Circuit Court of Appeals in 130 Fed. 112.

In *Ralston vs. Sharon et al.*, 51 Fed. 702, 707, it was held by Hawley, J.:

"A bill in equity constitutes an original and independent proceeding when it calls for the investigation of a new case arising upon new facts although it may have relation to the validity of an existing judgment *or decree* and of the complainant's rights to claim any benefit by reason thereof or to be relieved therefrom as the case may be. In such cases it is now well

settled that courts of equity have the unquestioned power to give relief against judgments or decrees which were obtained by fraud, notwithstanding the fact that the suit as instituted has relation to frauds alleged to have been committed in a former suit in courts of another jurisdiction, *state or national.*" (Italics are ours.)

Citing a large number of cases.

D. THE GENERAL RULE APPLIES TO ENJOINING THE ENFORCEMENT OF A DECREE OF ONE COURT OF EQUITY BY ANOTHER

The authorities hereinbefore cited clearly establish the proposition stated in the above heading. The following are cases in which it was held that a court of equity has jurisdiction to entertain an original bill to enjoin the enforcement of a decree of another court of equity obtained by fraud.

Graver vs. Faurot, 76 Fed., 257, 263 C. C. A. 7th Cir.

Dowagiac Mfg. Co. vs. McSherry Mfg. Co., 155 Fed. 524, C. C. A. 6th Cir.

United States vs. Throckmorton, 98 U. S. 61.

Toledo Scale Company vs. The Computing Scale Co., Record p. 484.

Carver vs. Jarvis-Conklin Mortgage Trust Co., 73 Fed. 9, Opinion Severens J.

Ralston vs. Sharon et al. 51 Fed. 702.

IV. The Circuit Court of Appeals erred in holding that the fraud complained of in the District Court of Ohio is not extrinsic fraud.

As we believe we have hereinbefore demonstrated, the Circuit Court of Appeals for the Seventh Circuit had no jurisdiction to pass upon this question, but since it undertook to do so, we shall discuss it.

As hereinbefore pointed out the definition given by the Circuit Court of Appeals of what is intrinsic fraud does not at all fit the fraud set forth in our bill in the District Court of Ohio and its definition of what is extrinsic fraud exactly does fit the fraud as alleged in the bill in Ohio. The Circuit Court of Appeals further said,

> "It is only extrinsic fraud that furnishes a basis for the independent bill and since such an independent bill is cognizable by any court of equity, State or Federal, extrinsic fraud must be fraud of such a character as to enable the secondary court (a state court for example) to annul the decree of the primary court (a Federal Court for example) without trying the original case which might be of exclusively federal cognizance." (Record p. 483.)

Our contention is that the District Court in Ohio or the State Court in Ohio having jurisdiction of the person of the Computing Company can entertain a petition to enjoin the Computing Company from enforcing the decree obtained in the Seventh Circuit by extrinsic fraud, and to do so such Court can examine the record made in the Seventh Circuit and determine

whether the decree there obtained was obtained by reason of "fraudulent conduct of the successful party which was practiced outside of an actual adversary trial (if there ever was one) and which was practiced directly and affirmatively on the defeated party (or his agent, attorney or witnesses) whereby he was prevented from presenting fully his side of the case." (Definition of extrinsic fraud given by Circuit Court of Appeals, Record, p. 484). Let us take what the Circuit Court of Appeals say is the simplest case:

> "A sues B in a Federal court for infringement of a patent. A procures the marshal to serve X and to return that he has served B. X appears and a trial results in decree of infringement and damages against B. B first learns of the fraud when the marshal levies on his property. B thereupon files his independent bill against A in a State court. On the proof of the facts the State court annuls the Federal decree by enjoining A from taking any steps to enforce it." (Record p. 483.)

Here the State court must look at the record of the Federal court to see whether it shows that the court found that there had been service of process upon B. Upon looking at it it finds that it does so show. Thereupon it hears evidence to ascertain whether such showing of service was brought about by reason of the fraud of A. Finding that it was it enjoins A from taking any benefit from the decree (but it does not "annul" the decree). This is precisely the same process which will be pursued in the proceedings in the District Court in Ohio. That court will look at the record in the District

Court in Illinois and the Circuit Court of Appeals for the Seventh Circuit and will find that that court has adjudicated that Toledo Company has infringed a certain patent and that it should pay its profits from the infringement to the Computing Company. It will thereupon hear evidence to determine whether that result was brought about by the fraud of the Computing Company, and if it finds that it was so brought about it will enjoin the Computing Company from taking any advantage from that decree but it will not "annul" the decree. The process is precisely the same in one case as in the other. The only difference is that in the "simplest case" suggested by the Circuit Court of Appeals the finding or adjudication of the primary court that it had jurisdiction of the person of the defendant is shown to have been obtained by fraud, whereas in our case the adjudication of the primary court that the patent is valid is shown to have been obtained by fraud. In both cases the decree of the primary court will be left undisturbed. The secondary court will not annul the decree but will simply act upon the person of the party who obtained it by enjoining him from enforcing it.

The distinction which the Circuit Court of Appeals attempts to draw between cases which require the secondary court to consider whether the decision upon the merits of the original case was affected by the fraud, and cases which do not require the secondary court to consider whether the fraud affects the decision of the court upon the merits is not sustained by the authorities.

See *Graver vs. Faurot,* 76 Fed. 267, *Chicago R. I. & P. R. R. v. Callicotte,* 267 Fed. 799, *Marshall vs. Holmes,* 141 U. S., 589, and other cases *supra.*

In Marshall v. Holmes the court said:

> "The suit being, in its general nature, one of which the Circuit Court of the United States could rightfully take cognizance, *it was for that court,* after the cause was docketed there, and upon final hearing, to determine whether, under the allegations and proof, a case was made which, according to the established principles of equity, entitled Mrs. Marshall to protection against the judgments alleged to have been fraudulently obtained." (Italics are ours.)

In the case at bar the courts in the Seventh Circuit have found that the patentee of the Dayton Company's patent was the first inventor of the light weight paper cylinder in computing scales. The District Court in Ohio, if it sustains our contention, will find that evidence showing that the patentee of the Dayton Company's patent was not the inventor of the light weight paper cylinder, was fraudulently kept from Toledo Company and from the courts in the Seventh Circuit by the purchase, suppression and secretion by the Computing Company of all the anticipating cylinders and other fraudulent suppression of evidence.

In making the erroneous statement (Record p. 483) that it is our contention that there must be an adjudication of the invalidity of the patent by the court in which our injunction suit is planted, the Circuit Court of Appeals seeks to demonstrate that our position with

respect to extrinsic fraud is erroneous for the reason that if our suit had been started in a state court such court could not, of course, adjudicate the invalidity of the patent. The Circuit Court of Appeals, however, goes one long step beyond our position, as above pointed out. The decision in the District Court in Ohio on our bill will not be an adjudication that the patent is invalid. It will be an adjudication that a certain decree based on that patent was obtained by fraud. The mere fact that in order to arrive at the conclusion that the fraud was operative the court will have to consider whether the fraud materially affected the result, does not mean that the court will or can proceed to an actual adjudication such as the primary court could and should have made. The utmost the court in Ohio can say is that "We find The Computing Scale Company was guilty of fraudulent conduct outside of court which prevented Toledo Scale Company from fully and fairly presenting its defense to the primary court. As a result of the absence of the defense eliminated by this fraud The Computing Scale Company obtained its decree. It is inequitable to permit it to take any advantage from a decree so obtained and it is accordingly enjoined from enforcing it." There is nothing in all this which requires an adjudication of the validity or invalidity of a patent and nothing which could not be done by a State court having jurisdiction of the parties.

The suggestion made by the Circuit Court of Appeals that because the original case was a patent case and hence within the exclusive jurisdiction of the

Federal courts our position that a suit to enjoin the enforcement of the decree for fraud in obtaining it could be maintained in any other court (State or Federal) having jurisdiction of the parties cannot be maintained, is shown to be erroneous by the decision of this court in *Arrowsmith vs. Gleason,* 129 U. S. 86, and *Johnson vs. Waters,* 111 U. S. 640, 667, *supra.*

We respectfully submit that the attempt of the Circuit Court of Appeals to classify fraud as intrinsic or extrinsic, according to whether it does or does not operate to affect the merits of a judgment or decree is not sustained by any authority and is contrary to every authority upon the subject, and that that court is just as clearly wrong in deciding this question as in its assumption of authority to decide it.

V. The Circuit Court of Appeals Erred In Holding That It had Ever Passed Upon The Question Of Fraud Which Is Raised In The Ohio Case.

This again, under *Kline* v. *Construction Company supra,* is a question which is for the courts of the Sixth Circuit and not those of the Seventh to decide; but we shall discuss it because it will undoubtedly be argued by counsel for Computing Company, and the court below undertook to pass upon it.

The applications which were made to the Circuit Court of Appeals were not for relief upon the ground of fraud, but were both applications for leave to apply to the court below to reopen the case and receive newly

discovered evidence. (Record pp. 183 and 1383.) In denying these applications the Circuit Court of Appeals did not say anything about fraud.

The difference between the claims which were presented to the Circuit Court of Appeals for the Seventh Circuit in 1913 and in 1917 by Toledo Company, and its claims for relief as set forth in the bill in the present case, is well put by Judge Killits in his opinion, (Record p. 460), as follows:

> "As we read the record in the litigation, all the defendant therein was then charging against the plaintiff was an ignoring of certain facts, a passive attitude toward them, while here the charge is that deliberately and with a fraudulent purpose and for the purpose of getting prejudicial testimony out of the way, an active campaign was prosecuted by the plaintiff in the litigation in question to buy up and destroy the physical evidences of prior use."

All that the record in the Seventh Circuit showed was that the Computing Company had, through other litigation involving the Smith Reissue patent, learned of the fact that Phinney had actually made and sold scales embodying the lightweight skeleton cylinder, which was the alleged patented feature of the Computing Company's scale. As proof that it had such knowledge, the fact that it and its counsel had come into possession of several of the Phinney scales was mentioned, and (as showing what was in the nature of an admission by the Computing Company that the Phinney scales constituted a defense to

claims based on the Smith Reissue patent) Toledo Company called attention to the fact that, in the case brought by the Computing Company against the Federal Scale Company, upon the old Phinney scales being produced the Computing Company abandoned the suit.

All of these statements were made in the petition for leave to dismiss the appeal as to the Smith Reissue patent, (See Record p. 183). It is, we submit, clear that they meant nothing more than that the Computing Company had had knowledge of evidence which, in its opinion, constituted a defense to its suit against Toledo Company on the Smith Reissue patent and had said nothing about such evidence, either to Toledo Company or to the court; that Toledo Company did not find this evidence until after the conclusion of the trial in the trial court and the filing of the appeal. Upon this showing of facts, the Toledo Company based its prayer

> "that it may be allowed to withdraw or dismiss its appeal from so much and such parts of the decree appealed from as relate to and are based upon Reissued Letters Patent No. 11536, being one of the two separate Letters Patent upon which said decree was based, for the purpose of enabling your petitioner to present to the District Court a petition praying that said cause be reopened and your petitioner be permitted to introduce therein certain newly discovered evidence affecting the validity of said reissued letters patent, and without prejudice to the right of your petitioner to present and of the District Court to entertain and grant said pe-

> tition if it be so advised, and without prejudice to the right of your petitioner to raise and have determined by this court all questions affecting the validity and infringement of said reissued letters patent upon any appeal which may hereafter be brought to this court from any final decree in this cause." (Record p. 183.)

It is well settled that mere non-disclosure of a possible defense by one litigant to his opponent where there is no duty to disclose, does not constitute fraud.

> Graver vs. Faurot, 76 Fed. 257, C. C. of A., 7th Cir.

On this point counsel for Computing Company said in their brief in the court below:

> "* * * * * it may be stated that there was no duty on the part of The Computing Scale Company to disclose anything." (Citing authorities) "It is only where there is a duty to disclose that fraud can be predicated on concealment."

Even if the Toledo Company had claimed that the non-disclosure of knowledge of this defense by the Computing Company constituted fraud, and in its applications to the Circuit Court of Appeals had asked for relief because of such fraud, (which it did not do), in said applications, still the only question which the Circuit Court of Appeals could have passed upon would have been: "Was The Computing Scale Company under any duty to disclose its knowledge to the Toledo Scale Company?" No matter how the Circuit

Court of Appeals might answer this question, it seems obvious that its decision, even if it amounted to the dignity of a final decree, (which it did not), could not by any possibility be held to be a decision upon the merits of the question now raised in the District Court of Ohio. What Toledo Company complains of in its bill in Ohio is not non-disclosure of knowledge; it complains of the formation and consummation of a deliberate plot to deprive Toledo Company of opportunity to learn by its own investigation of the defense and to obtain evidence establishing the defense. As was well said by Judge Killits:

> "The difference between the two states of fact: that presented to the court rendering the decree, and that embodied in the bill and the record here, is not merely one of degree but of quality." (Rec. 459-460.)

The Circuit Court of Appeals say, (Record p. 487), after quoting from the affidavit of Thomas Z. Phinney:

> "So we believe that Phinney's testimony afforded a fair basis for Toledo Company's former counsel's contention that Computing Company had gathered in all the Phinney scales it could find and get possession of and had concealed and suppressed them as evidence."

Mr. Phinney's affiadivit, which was before the Circuit Court of Appeals, will be found at page 71 of the record, and we confidently invite the court's examination of it to ascertain whether it affords any basis, let alone "a fair basis," for any such contention as that which

the Circuit Court of Appeals says Toledo Company's former counsel made. Moreover, an examination of the briefs filed in the Circuit Court of Appeals and in this court by Toledo Company's counsel will demonstrate that there is no contention therein "that Computing Company had gathered in all the Phinney scales it could find and get possession of and concealed and suppressed them as evidence."

The strongest statement made by Toledo Company's counsel with respect to the conduct of Computing Company was made in the first petition for certiorari herein, in which it is said, (page 10-11), referring to the affidavits filed in support of the motion to modify the mandate.

> "The affidavits further showed *that plaintiff had had full knowledge of the Phinney scales for more than ten years,* that evidence and numerous samples of them had been introduced in a suit which plaintiff had brought at Philadelphia ten years earlier upon the reissued patent here in suit, that the prosecution of said suit had been abandoned because of such evidence, and that plaintiff had suppressed and concealed such fact from the court and defendant throughout the litigation in the present cause." (Italics are theirs.)

Here is a charge of suppression and concealment of "such fact." "Such fact" consisted of: (a) Knowledge of the Phinney scale for more than ten years; (b) That evidence of them had been introduced in another suit brought by the Computing Company ten years before; (c) That the prosecution of said suit had been

abandoned because of such evidence. There is in this language no contention "that Computing Company had gathered in all the Phinney scales it could find and get possession of and had concealed and suppressed them as evidence." There is no suggestion that they had gathered in *any* Phinney scales, let alone *all*, they could find; and there is here no allegation that the Computing Company had concealed and suppressed the Phinney scales. The allegation is that they suppressed the fact that the scales had been successfully used in another litigation. The language above quoted, even had it been embodied in the applications to the Circuit Court of Appeals, would not have presented to them, and it did not present to this court, the claim of fraud now asserted in the bill in Ohio. The decision of the Circuit Court of Appeals in denying the applications to it, therefore, could not have the effect of estopping Toledo Company to assert the fraud now complained of. *Reynolds vs. Stockton,* 140 U. S. 254.

The Court of Appeals, however, say that if the interpretation given Phinney's testimony by them is not fair, that

> "it at least shows that Toledo Company had continuously in its hands the thread which if followed would have led to Computing Company's lair, which Toledo Company's present counsel alleged was first discovered on December 20, 1921, after the affirmance of the accounting decree * * *. During the eight years between our affirmance of the decree of validity and our affirmance of the final decree on accounting,

> Toledo Company, with the aforesaid facts and clues in its possession, and without applying to this court as the only court having authority to grant relief for newly discovered evidence which might make an accounting unnecessary, engaged Computing Company in a prolonged accounting contest, which involved great labor and expense."

Toledo Company had no new evidence which it could have presented to the Circuit Court of Appeals during the eight years referred to, except that which it had already twice submitted to that court and which that court had twice refused to permit the lower court to receive. It was not until December of 1921 that the evidence of the fraud now complained of came to the knowledge of Toledo Company. What the Circuit Court of Appeals must mean, therefore, is that Toledo Company is not now entitled to relief, notwithstanding the fraud of the Computing Company, because of the fact that Toledo Company had what the court regards as a clue to the fraud of the Computing Company and did not follow it up but instead engaged in a prolonged accounting contest. This amounts to saying, it seems to us: "That where one party is found to have perpetrated a deliberate fraud upon the opposing party and upon the courts, and because of such deliberate fraud has imposed a prolonged accounting contest upon the other party, and where such other party has knowledge of what a court, looking backward after the fraud has been discovered, says was a clue which should have led

to the fraud, and did not follow up such clue but engaged in the prolonged accounting contest before following it up, that in such case the equities are with the party who has perpetrated the deliberate fraud rather than with the defrauded party. Failure to suspect the other party of fraud and to follow a so-called 'clue' is a greater crime than the commission of the fraud itself."

This is not, and never has been the law. In *Kilbourn vs. Sunderland,* 130 U. S. 505, this court said:

> "We hold that the complainants moved with sufficient promptness upon discovering the fraud, and that although reposing confidence in their agents, *they may have neglected to avail themselves of some sources of knowledge they might have sought the defendants cannot be allowed to say that complainants ought to have suspected them and are chargeable with what they might have found out upon inquiry aroused by such suspicion.*" (Italics are ours.)

In *McIntire* vs. *Pryor,* 173 U. S. 38, on a bill to vacate for fraud a decree of foreclosure rendered nearly twenty years before, this court said:

> "In a case of actual fraud we believe no case can be found in the books in which a court of equity has refused to give relief within the lifetime of either of the parties upon whom the fraud is proved or within thirty years after it has been discovered or becomes known to the party whose rights are affected by it."

It is, we submit, a novel result in a court of equity, to hold that a decree which the court accepts as having

been obtained by fraud must in the interests of justice be permitted to stand, because of the successful concealment of the fraud by the one party and the failure of the other party who, in fact, has no knowledge of the fraud, to suspect it and investigate.

This court will find on examining the record, we submit, that the Circuit Court of Appeals was clearly in error in its rulings that it had ever passed upon the question of fraud, and that the Toledo Company cannot now assert its rights based upon the fraud.

VI. The Circuit Court of Appeals Erred in Holding that its Refusal to Grant the Applications of Toledo Company for Leave to Apply to the District Court of Illinois for Leave to Introduce Newly Discovered Evidence Was a Final Decree barring relief under the Ohio Bill based on Extrinsic Fraud

It is well settled that the decision of an application addressed to the discretion of a court does not constitute a bar to the consideration even of the same facts by another court to which they are presented as a matter of right and this rule applies with full force to those cases in which, after an application to a court to open up its judgment is denied by it in the exercise of its discretionary power, the same facts are subsequently urged as a ground for injunction because of fraud or mistake.

In *Metcalfe vs. Williams,* 104 U. S. 93, plaintiff sought to enjoin a judgment on the ground of mistake and surprise. The surprise relied on was the failure of the clerk to enter a plea of a general denial as he had said he would, and that judgment had been entered in default of answer. It appeared that plaintiff had moved the court in which the judgment was rendered to reinstate the cause upon the docket, but that this motion had been denied. The Supreme Court said:

> "Perhaps in view of the equitable control over their own judgments which courts of law have assumed in modern times, the judgment might have been set aside, on motion, for the cause set forth in the bill; but if this were true, the remedy in equity would still be open; and *the fact that the court declined to exercise the power upon motion rendered the resort to a bill* necessary and proper." (Italics are ours.)

In *Denny vs. Bennett,* 128 U. S. 488-498, the court said:

> "So far as the motion to dissolve the attachment is concerned, we concur with the Supreme Court of the State of Minnesota, *Bennett vs. Denny,* 33 Minn. 530, in holding that it was merely a decision of a motion or summary application, which is not to be regarded in the light of *res adjudicata,* or as so far conclusive upon the parties as to prevent their drawing the same matters in question again in the more regular form of an action."

In *Oklahoma City vs. McMaster,* 196 U. S. 529, at page 533 the court say:

> "Without a judgment a plea of res judicata has no foundation; and neither the verdict of

a jury nor the findings of a court, even though in a prior action, upon the precise point involved in a subsequent action and between the same parties, constitute a bar. In other words the thing adjudged must be by a judgment. A verdict or finding of the court alone is not sufficient. The reason stated is that the judgment is the bar and not the preliminary determination of the court or jury. It may be that the verdict was set aside or finding of facts amended, reconsidered or themselves set aside or a new trial granted. The judgment alone is the foundation for the bar."

In *Freeman on Judgments,* Volume 2, Section 511.

"Denial of a motion to open a judgment does not preclude a court of equity from subsequently granting the relief denied at law. The decision of such motion is not such a res adjudicata as precludes equity from re-examining the question. The opening of a judgment in a court of law is always ex gratia, while restraining the plaintiff from proceeding on the judgment is, in equity, a matter of right."

In *Van Fleet on Former Adjudication,* Volume 1, page 98, it is said;

"Of course, the denial of a motion which is addressed to the discretion of the court concludes nothing. Thus, a defendant, after a judgment against him by default in a court of law, having made an application to the discretion of the court for an opportunity to make an equitable defense, a denial of his motion is no bar to a bill in equity to obtain relief upon the same equities."

In *Bucki vs. Atlantic Lumber Company,* 116 Fed. 1, (C. C. of A. Fifth Circuit), a bill was filed for the limitation of the amount of judgment rendered at law. Complainant as defendant in the law action had claimed a set off which the law court at first refused to allow. In overruling the motion for a new trial the law court decided that it had erred in excluding the set off and made its order conditional on a remittitur by the plaintiff of the amount of the set off from the judgment. The court through mistake, as the defendant claimed, fixed the amount of the set off at $583.07 instead of $4,553.90. The defendant in the law case proceeded to have the judgment reviewed on a writ of error and failing there, filed his bill in equity to restrain the enforcement of the judgment for an amount in excess of what it would have been had the full set off claimed by him been allowed, claiming equitable jurisdiction on the ground of mistake. It was held by a majority of the court that the bill was

> "not demurrable for want of equity but stated a cause of action for relief demanded on the ground of mistake." Following *Metcalfe vs. Williams,* 104 U. S. 93.

If the Circuit Court of Appeals had decided in favor of Toledo Company and had entered an order authorizing the court below to receive the newly discovered evidence, this certainly would not have amounted to an adjudication that the Computing Company had been guilty of fraud or even of non-disclosure. In *Merriam Co. vs. Saalfield,* 241 U. S. 22, this court said, (p. 28):

> "Ogilvie could not have taken advantage of that decree had it been adverse to complainant and therefore was not estoppel by it, since estoppels must be mutual."

It follows from this that since a favorable decision from the Circuit Court of Appeals would not have created any estoppel or adjudication in favor of Toledo Company as against the Computing Company upon the claim of fraud, that the decision of the Circuit Court of Appeals denying the applications of Toledo Company did not create any estoppel or adjudication of which the Computing Company can take advantage as against Toledo Company.

VII. The Order Directed by the Circuit Court of Appeals Operates to Protect the Wrong Doer and to Punish the Innocent

It seems clear to us that the result reached in the Circuit Court of Appeals is fundamentally wrong. It does not appeal to our sense of "fair play" to say that a party who has been guilty of wilfully wrong and fraudulent conduct, a party who has deceived the Court, a party who has secreted and destroyed evidence of a defense in preparation for lawsuit, a party who has deceived its own lawyers as to the true facts of the case, a party who has produced perjured testimony from some of the witnesses and has deceived other witnesses by a false history of the prior art, is entitled to the aid of a court of equity as against a party whose sole crime, if any, is that he has not been sufficiently suspicious of his opponent's conduct.

This case involves no vested rights of the public; the Courts are not here asked to affect the rights of any innocent heirs or successors of the wrong doer; the issue in the District Court in Ohio is purely personal to the parties there; it is only whether The Computing Company did or did not obtain its decree in Illinois by fraud. If it did, it ought not in equity and common justice be permitted to collect that decree.

The patent expired before the first decision by the Circuit Court of Appeals in 1913 and Computing Company has not in any way changed its position because of the adjudication of its validity except that it has incurred the expense of the accounting ~~decree~~. Surely no one would say that this gives it any right to prevent Toledo Company from now exposing Computing Company's frauds in obtaining the original decree.

Whether it is or is not permitted to collect the decree is of no interest to any one outside of the parties to the litigation. There are in this case no rights of the public which rise paramount to those of private parties and require that injustice be done in this particular case for the greater good of the greater number.

The result in the court below is that although the Court accepts as a fact that the Computing Company obtained its decree by fraud, it is to be permitted to reap the fruits of its fraud to the extent of half a million dollars, and Toledo Company is to pay this amount, plus such expense as the Computing Company may have been put to by the effort of the Toledo Company to obtain the protection of a court

of equity against the fraud. The wrongdoer is to be protected; the innocent is to go not only unprotected, but is to be punished for seeking the protection of a court of equity against the wrongdoer; and all this because the Computing Company was successful, first in perpetrating a fraud, and second, in concealing for eight years the fact that it had perpetrated it. The Circuit Court of Appeals say that the interests of the Republic require this result, a proposition with which we hope this court will disagree.

Not the least peculiar feature of the whole case is that Toledo Company has been found guilty of laches in not discovering the fraud earlier by a court which has never heard any evidence on the subject.

We are impressed with the notion that the result in the court below and the manner in which it was reached establish a most dangerous precedent, and if allowed to stand, will constitute an invitation to litigants to refrain from "fair play."

The proceedings in the Seventh Circuit on the petition of the Computing Company are nothing but an effort to enlist the aid of a court of equity on behalf of one guilty of fraud to prevent an investigation of that fraud by another court of equity and such aid has been obtained and the investigation of the fraud has been enjoined. This court only can now remedy this situation.

We respectfully submit that what was said by the Circuit Court of Appeals for the Seventh Circuit in *Graver vs. Faurot*, 76 Fed. 257, fully applies to the

decree obtained by the Computing Company in the Seventh Circuit and that,

> "In reason and good conscience a decree obtained as this one is alleged to have been ought to be annulled. There can be no consideration of public policy or of private right on which it ought to stand. There can be and ought to be no repose of society where for such wrongs the courts are incapable of giving redress."

VIII. Contentions Made by The Computing Company Are Unfounded

Counsel for appellants have consistently treated the petition for leave to dismiss the appeal and the motion for a modification of the mandate, and even the briefs, filed by Toledo Company in the Circuit Court of Appeals for the Seventh Circuit as bills of review. In fact, however, none of them was a bill of review. A bill of review is a pleading filed in a trial court seeking to have that court reopen its decree, (a) to correct an error of law appearing upon the record; (b) to receive evidence as to happenings since the decree, affecting the propriety of permitting it to stand; or (c) to receive newly discovered evidence. If an appeal has been taken from the trial court to an appellate tribunal, the trial court may not entertain a bill of review until leave has first been granted by the appellate tribunal to that effect. This leave may be granted or refused by the appellate tribunal in its discretion, for any reason which may appeal to it.

If leave is denied, there is an end of the matter; if leave is granted by the appellate tribunal, then the

applicant may be heard upon his bill of review by the trial court, which in its discretion may grant the prayer of the bill and reopen the decree or may deny relief and dismiss the bill. Counsel for appellant have sought to impress the courts with the idea that Toledo Company has had a hearing *upon a bill of review* with respect to the evidence as to Phinney's commercial practice and has been denied relief upon the merits of such an application, and that in this bill of review there was included not only the claim of newly discovered evidence but the claim of fraud and concealment of evidence; whereas the facts are, as we have shown, that no application has ever been made to the District Court to reopen its decree and receive the newly discovered evidence, because the Circuit Court of Appeals for the Seventh Circuit has always declined to permit such a bill of review to be filed in the District Court.

It is conceded by counsel for Computing Company in their reply brief in the Circuit Court of Appeals for the Sixth Circuit *that no leave of an appellate court is necessary to file a bill to impeach a judgment or decree for fraud.* They say (Reply Brief 81): "The definition would indicate that it is so far an 'original bill' that it is filed without leave of court, as the cases seem to show."

Of course it goes without saying that the filing of an *original* bill to impeach a judgment or decree for fraud must be in some court of *original* jurisdiction, either that which rendered the judgment or decree,

or some other having jurisdiction of the parties and the controversy. The Circuit Court of Appeals is not a court of *original* jurisdiction and has no jurisdiction to entertain an *original* bill to impeach a judgment or decree for fraud. Counsel for Computing Company contend, however, that the action of the Circuit Court of Appeals for the Seventh Circuit, in denying permission to Toledo Company to apply to the District Court in Illinois to receive the newly discovered evidence, constitutes *res judicata* of the issue of fraud raised in the bill of complaint in the Ohio case. Even had Toledo Company then known of the fraud, which it did not, and even had it expressly alleged fraud in its petition, which it did not, and even had the Circuit Court of Appeals for the Seventh Circuit expressly held on this petition that Toledo Company was not entitled to relief against the decree because of fraud, which it did not, still that holding would not have been *res judicata.* Parties cannot confer jurisdiction of the subject matter upon courts by consent, nor can they, by attempting to present to *appellate* courts issues which can be presented only by original bill in *trial* courts, convert the appellate courts into trial courts so as to make their resulting action operate as a judgment or a decree barring relief on an *original* bill subsequently filed in a court of *original* jurisdiction.

The moment counsel for the Computing Company admitted (what is, of course, indisputable under all of the authorities) that a bill to impeach a judgment or decree for fraud is an original bill and may be filed

without leave, even though the original case be then pending in an appellate court, just that moment they destroyed their entire claim that the issue of fraud raised in the Ohio case has or could become *res judicata* by reason of any action taken by the Circuit Court of Appeals for the Seventh Circuit in denying leave to Toledo Company to apply to the District Court to receive the newly discovered evidence. If the claim of Toledo Company was based on fraud the Court of Appeals had no jurisdiction to deny it. If (as we have shown) it was not based on fraud, no order upon it could be an adjudication as to fraud.

Coming now to the next application to the Circuit Court of Appeals for the Seventh Circuit, this was similar in its nature to the first one. It was a motion that the Circuit Court of Appeals

> "include in its mandate to the District Court permission to said District Court to entertain and consider and if so advised, to grant an application of the defendant for leave to introduce proofs in said cause respecting computing scales alleged to have been manufactured and sold and introduced into use by William H. Phinney of Pawtucket, Rhode Island, prior to the date of the invention described and claimed in the reissued letters patent in suit in said cause, and to rehear said cause on such additional proofs." (Record Vol. II p. 1383.)

Two things are again clearly apparent with respect to this application: First, that it was not a bill of review but was a motion for leave to apply to the District Court to entertain a bill of review, upon which

no order could be entered except one granting or refusing leave to make such an application; Second, that it sought no relief upon the ground of fraud and made no claim of fraud.

The Circuit Court of Appeals had held that the Computing Company had failed to make proper proof that it held the title to the Smith Reissue patent, and its mandate included a direction to the District Court to permit the Computing Company "to introduce proofs of title to the first patent." (Vol. 3 p. 1425). As Computing Company was to be permitted to introduce new evidence, it was perhaps quite natural for Toledo Company as defendant to assume that a similar privilege would be granted to it upon its application therefor, accompanied with a showing as to the materiality of the new evidence on the issue of validity. It accordingly filed the motion above quoted and filed with it a number of affidavits. It is the present contention of counsel for Computing Company that by these affidavits Toledo Company raised and submitted to the Circuit Court of Appeals the same issue with respect to the fraudulent purchase and the suppression of evidence as is involved in the Ohio suit. To this there are several answers: First, the claim is unfounded in point of fact. Second, no issue of fraud or concealment was attempted to be presented by the *motion*, and consequently *evidence* of fraud or concealment could not properly have been considered by the Circuit Court of Appeals. Third, as we have hereinbefore pointed out in discussing the first application to

the Circuit Court of Appeals, it had no jurisdiction to entertain a bill to impeach the decree below for fraud or to refuse leave to file such a bill in the Court below. Fourth, its decision on the motion, no matter how it decided it, could not be decisive of anything except that the defendant should be or should not be permitted to apply to the District Court for leave to offer the new evidence.

With respect to what is in the affidavits, the court can best inform itself, of course, by reading them. All of the affidavits which were before the Circuit Court of Appeals will be found at pages 192 to 210 of the present record. Upon reading them the court will find that they contain no charge that the Computing Company had fraudulently acquired or suppressed scales manufactured by Phinney, and no charge that the Computing Company had ever taken steps to obtain the silence of witnesses as to Phinney's commercial practice. These affidavits show that the Computing Company through its litigation with others knew that Phinney had manufactured and sold scales which anticipated Smith's patent, and knew that the scales so made by Phinney were accurate weighing machines, by reason of the fact that one of its workmen, King, had adjusted and cleaned up one of the Phinney scales which was in the Computing Company's factory, so that it weighed accurately, (Record p. 303), that there were several of these scales which had come into the possession of the Computing Company and of its counsel in litigation against others, and that such other litigation had been

abandoned when the defendants brought in the Phinney scales as exhibits with evidence as to their use. There was nothing to show that the few scales which the affidavits mentioned as having come into the possession of the Computing Company or its counsel had been acquired by the Computing Company for any improper motive, nor was there any showing that the Computing Company had taken any steps to prevent knowledge of Phinney's commercial practice coming to Toledo Company.

So far as they went, the affidavits tended to exonerate the Computing Company from any imputation that it was in any way wrongfully responsible for the disappearance of the Phinney scales which had been out in the possession of the public; for the affidavits mention the acquiring of three scales by the Boston Computing Scale Company, (subsequently acquired by the Computing Company, but at that time not connected with it) and that in the then belief of Thomas Z. Phinney the other scales had been gathered up in connection with the Federal Scale litigation. (Record p. 291.) In the absence of any showing to the contrary, the fair presumption would be that this was done legitimately for the purpose of using the scales on one side or the other in that litigation.

It passes our understanding how, on these facts, counsel can now make the claim that there was before the Circuit Court of Appeals the evidence which is now before the court in the Ohio case from direct participants in and from others who assisted, in some cases

unwittingly, in carrying on the plot, which is disclosed by the present record. The Ohio record shows that the Computing Company set out to crush its rival, the Toledo Company, not only because it was a dangerous competitor but because it had publicly exposed and had had judicially determined the dishonesty of the scale which the Computing Company was foisting upon the public. The record shows that because of these facts the officers of the Computing Company determined to drive Toledo Company out of business and as one of the means to that end brought the suit upon the Smith Reissue patent; that it knew this patent was no good because Phinney had made and sold scales which anticipated it; that it knew that not many of these scales had been made; that a portion of these were already in its possession and in that of its counsel as a result of the Federal Scale litigation; that it formed a deliberate plan to corral and suppress all of the remaining Phinney scales and, so far as seemed necessary, to induce those persons who had knowledge of them to remain silent.

Toledo Company has charged that the attorneys who brought the suit in Illinois which resulted in the decree now under attack were kept in ignorance by the Computing Company of the facts with reference to the manufacture and sale of the Phinney scale by Phinney and with reference to the suppression of evidence by the Computing Company, and although the original counsel for the Computing Company in the Illinois case have filed affidavits in the Ohio suit, it is of the

utmost significance that *they nowhere in their affidavits* (Record pp. 45-46.) *assert that they had any knowledge of the Phinney scales or of the concealment of them by the Computing Company, and that they nowhere deny that they were kept in ignorance of these facts by the Computing Company.*

It is also significant that although Toledo Company charges that the Computing Company was advised by Church & Church, its attorneys in the Federal Scale Company litigation, that the Smith Reissue patent was invalid because anticipated by the scales made by Phinney; and although one of the officers for the Computing Company has communicated with a member of the firm of Church & Church with reference to the Ohio litigation, (See Record p. 55), there is in the record no denial from Church & Church of the allegation made by Toledo Company that they advised the Computing Company as stated.

The Ohio record shows that the suit in Illinois was not begun until the General Manager of the Computing Company, who was in charge of the execution of the plot against Toledo Company, had become convinced that all of the Phinney scales had been obtained and secreted, so that it was safe to go ahead with the suit. (Record p. 87) The record shows that Smith, the inventor of the Smith Reissue patent, was kept in such relationship with the Computing Company as that it was against his interest to disclose his knowledge of the Phinney scales (Record p. 66), and he was actually used as a witness by the Computing Company in its

behalf while under an engagement to the Computing Company, which enlisted him on its side. (Record p. 563).

We respectfully submit that the foregoing discussion of and references to the record show to be unfounded any claim which may be made in Computing Company's brief to the effect that the allegations as to prior use of the Phinney scale and as to the fraudulent conduct of the Computing Company, which were presented to the Ohio District Court by the bill and supporting affidavits were contained in the motions and affidavits which were submitted to the Circuit Court of Appeals for the Seventh Circuit.

If it is claimed herein by counsel for Computing Company that the Circuit Court of Appeals for the Seventh Circuit ever considered upon its merits the claim now made by Toledo Company, that the Phinney scale, as actually manufactured and sold, constituted a prior public use of the device attempted to be covered by the Smith Reissue Patent, and held upon the merits that the public use of the Phinney scale did not constitute such an anticipation, such claim will be conclusively refuted by an examination of the three formal opinions rendered by the Circuit Court of Appeals, found in the record at pages 147 and 3266 and 478, and the so-called opinion claimed to have been rendered on the petition of Toledo Company to dismiss the appeal, found in the answer of the Computing Company filed in the District Court in Ohio. (Record p. 130).

In the opinion first mentioned, the Circuit Court of Appeals said, (Record page 147):

> "Long before Smith's time, and the length of the interval is a fact of considerable weight, the *paper art* (Phinney's Patent No. 106,869 in 1870 and Babcock's No. 421,805 in 1890) had professed to teach practical scale-makers how to build automatic computing scales." (Italics are ours.)

This language shows that the Court considered only the "paper art" in this connection and not Phinney's commercial practice. It is true that the Court says in the next sentence, "but when those disclosures were given material bodies, failure was the result;" but it is clear that this does not refer to Phinney's commercial practice of which there was then no evidence in the record, but to the testimony of the witness Culmer, hereinafter referred to, who had *with certain material deviations* from the Phinney specifications, attempted to make a scale from the directions in the Phinney patent; "those disclosures" clearly refers to the disclosures in the patents and not to Phinney's practice of building scales upon specifications not included in the patent. If this opinion is read in full it will be found that there is not a single reference in it to the scales which Phinney made and sold.

Taking up as next in time, the "opinion" refusing Toledo Company's first motion, as set out in the Ohio answer, (Record p. 130), we find that the Circuit Court of Appeals, (as now claimed by the Computing Company) in denying this motion to dismiss the appeal

as to the Smith Reissue Patent, so that application might be made in the District Court of Illinois to open its decree and to receive the newly discovered evidence as to the Phinney scales, denied the application as a discretionary matter, not upon the ground that the evidence was not material, but upon the ground that Toledo Company had not exercised sufficient diligence in discovering it. That "opinion" reads, (Record p. 130):

> *"It is a question for the discretion of the court* but we are of the opinion that the court's discretion should be exercised otherwise and should not be exercised to reopen the case by a bill of review or otherwise. In our view the court would have no right to let in the new evidence. It is obvious no diligence whatever was exercised in this matter. The matter was instantly discoverable by inquiry in the neighborhood affected. It is like a suit respecting boundary lines. Some one living along the boundary line knows about it and avers it on information and belief, but does not prove it, and then wants to reopen. He is not permitted to do that."

The clear inference from this language is that the Circuit Court of Appeals was of the opinion that the Phinney commercial practice was an actual anticipation of Smith's patent, since they likened Toledo Company's position to that of one along a boundary line who *"knows* about it" but fails to prove it. Their decision clearly was that on the showing then made, their discretion was exercised to deny to Toledo Company the opportunity to put in the new evidence, not because the new evidence would not have been a de-

fense but because Toledo Company in their opinion, as the record then stood, had not exercised sufficient diligence in discovering it. The Ohio case asks no review by the Courts in the Sixth Circuit of this decision of the Circuit Court of Appeals for the Seventh Circuit. It is based on the proposition that this decision did not decide the question which is raised by the Ohio bill with respect to the materiality of the new evidence, and that it did not decide the question which is raised by that bill of complaint as to the fraud of the Computing Company in keeping this evidence from Toledo Company until it could no longer use it as of right in the District Court in Illinois.

Turning now to the opinion rendered by the Circuit Court of Appeals for the Seventh Circuit at the October term 1921, upon the hearing of the second appeal when the Circuit Court of Appeals had before it the proof taken before the Master as to Phinney's commercial practice, we find that the Circuit Court of Appeals refused to give weight to this evidence, not because it did not show an anticipation by Phinney of Smith but for two other reasons, first, the Court of Appeals' "conception of the nature of the merits decree," i. e. the rule of the law of the case, and second, because of "defendant's delay of eight years in presenting to us its bill of review to open our 1913 dismissal of its former bill of review *on the same ground.*" (Italics are ours). (Record Vol. 5 p. 3303) Again it will be seen that the court expressly avoided passing upon the question as to whether Phinney had in fact

because the new evidence would not have been a de-anticipated Smith. It should be noted that the Court regards the argument made to it in the brief on the second appeal that it should consider the Phinney commercial practice as being an appeal to it upon the same ground upon which it had denied relief in 1913. What this ground was deemed to be by that Court, is best shown by its entries in denying the two applications which were made in 1913. One will be found on page 1371 Vol II of the record. It speaks of "the motion of appellant that this appeal be dismissed as to reissued patent No. 11536, with leave to introduce newly discovered evidence in the District Court of the United States for the Northern District of Illinois, Eastern Division," and denies the motion. The entry denying the petition that the mandate be modified will be found on page 1413 Vol. II of the record. It speaks of the motion "that this court include in its mandate permission to the District Court to entertain and consider and if so advised to grant an application of the defendant for leave to introduce proofs in said cause respecting computing scales alleged to have been manufactured and sold and introduced into use by William H. Phinney of Pawtucket, Rhode Island, prior to the date of the invention described and claimed in the reissued letters patent in suit in said cause, and to rehear said cause on such additional proofs" and denies this motion. It is evident, therefore, that the Circuit Court of Appeals for the Seventh Circuit, regarded the argument in the brief which it passed upon in 1921 as urg-

ing upon it merely newly discovered evidence and not fraud and that it refused to consider the newly discovered evidence because a renewed application had not been made to it to receive the evidence as to prior use which was introduced before the Master.

It seems clear that if the Circuit Court of Appeals had decided that the cylinder used by Phinney was not an anticipation of Smith's, that it would have said so somewhere in this opinion, but as noted, the Court said nothing upon this subject.

Coming now to the opinion of the Circuit Court of Appeals, rendered at its January session, 1922, on the petition of the Computing Company to restrain Toledo Company from further maintaining the Ohio suit, the Court said (Record p. 479):

> "On appeal from the accounting decree, ————Fed. ————, Toledo Company again presented to this Court its contention respecting the Phinney testimony and exhibits. We ruled that the decree of validity and infringement was so far final in its essence as to preclude the Court below and this Court from deciding the issue of validity anew unless that decree should first be opened. Treating the matter as a petition in the nature of a bill of review, we held that the showing on its face disclosed a lack of reasonable diligence and no sufficient excuse for that lack."

It thus appears by this opinion of the Circuit Court of Appeals itself, that it has not passed upon the question of the Phinney commercial practice as affecting the validity of the Smith Reissue Patent.

In none of the four opinions is there any decision or even discussion by the Circuit Court of Appeals for the Seventh Circuit of the question as to whether the Phinney scales which had been produced before it coupled with the evidence of their prior sale and use, did or did not constitute proof of an anticipation of the Smith patent.

We submit that it is clearly apparent that there is no justification for any claim by Computing Company that the Circuit Court of Appeals for the Seventh Circuit considered upon its merits the claim made by Toledo Company, in the Ohio case, that the Phinney scale as actually manufactured and sold constituted a prior public use of the device attempted to be covered by the Smith Reissue Patent or that it ever held upon the merits that the public use of the Phinney scale did not constitute such an anticipation.

It has been claimed elsewhere by Computing Company that the witnesses for Toledo Company in the case in the Seventh Circuit testified that the scales manufactured and sold by Phinney would not weigh accurately, and that the Circuit Court of Appeals so held with reference to these scales. There is no justification in the record for any such claim. The only pretext found in the record for the claim that any witnesses for Toledo Company so testified is found in the testimony of two witnesses, Orwell C. Reeves and John W. Culmer. Reeves testified under cross-examination by one counsel for the Computing Company, (Record, Vol. IV p. 2670), as follows:

"Question: Well, now, did you take any test weight, and test those Phinney scales as to their weighing?

"Answer: I did not.

"Question: Why didn't you do that?

"Answer: I didn't think they would weigh properly.

"Question: That thing wouldn't weigh at all, would it?

"Answer: I don't know. It would indicate some weight, but it wouldn't indicate a correct weight. The scale, of course, wouldn't weigh, with the kind of bearings the scale was constructed with."

On re-direct examination Mr. Reeves testified on this subject: (Record Vol. V. p. 2671)

"The scale had been in storage undoubtedly for a long time, although the scale when in use had been sealed by a sealer, the spring would naturally lose much of its value as a means for the offsetting of a load on the platform, the bearings would undoubtedly rust, and there would be verdigris and dirt accumulate in the rack and pinion. * * * * *

"The sealer has a seal on the scale marked, 'John H. Potter, Town Sealer, Sealed January 9, 1880.' "

This witness was testifying as to a certain particular sample of Phinney scales, which had been out of use, not repaired or given any attention, for about fifteen years, during which time they had been knocking around in lawyers' office and as part of court records. Quite obviously, the witness was not in a posi-

tion to and did not intend to condemn Phinney scales as a class.

At least equally misleading is the claim that the witness Culmer testified that scales made in accordance with Phinney's commercial practice would not weigh correctly. Culmer did not claim to have seen or known anything about the scales which Phinney actually made. His testimony, relied on to support the claim of Computing Company is found at page 619 of the record. He there says:

> "As early as the winter of '92 and '3 I had contructed a full-sized model of such a scale, *changing it materially from the patent which it was supposed to represent;* but in every respect, so far as my knowledge went, the changes were beneficial. I could not find any other cause for its failure to work except the fact that *I could not counterbalance out the weight of my cylinder.*
>
> "Q. What patent did you have reference to in you previous answer?
>
> "A. The Phinney patent.
>
> "Q. What were the defects in operation of this scale which you attempted to make along the lines of the Phinney patent?
>
> "A. Excessive friction. I could not succeed in getting it to stop twice within one ounce of the same weight."

It will be noticed that Culmer said that he changed his model "materially" from the Phinney *patent,* so that it is unfair to claim that his experiment demonstrated even that a scale made in accordance with Phinney's patent itself would not weigh ac-

curately. We submit that the excerpts already given from Culmer's testimony prove that he knew nothing about the Phinney *scale* as made by Phinney and that all he did was to attempt to build a scale upon the incomplete specifications which Phinney had placed in his *patent,* which did not include the lightweight cylinder which Phinney actually used in the scales that he made.

At another place in the record Culmer says the rings or spiders he used in his experiment were cast iron, (Record p. 620-21) and not light, and were covered with two ply Bristol Board (i. e. like the Domestic cylinder, Record 620-612).

Counsel for Computing Company claim that Culmer's testimony that a heavy cylinder made of cast iron covered with two thicknesses of Bristol board would not weigh accurately means that Culmer was familiar with the lightweight skeleton cylinder with wooden discs covered with thin paper made by Phinney, and that this light-weight cylinder would not weigh accurately. We submit that this claim is wholly unjustified by the record.

Counsel for appellant would have the court find the testimony of these two witnesses that the scales which Phinney made and sold were not accurate weighing machines, in total disregard of the testimony of the witnesses Gillan (Record 172), McNally (Record 174), Devlin (Record 174), Fallon (Record 175), Horton (Record 176), and Tierney (Record 177), as to the long continued use of the Phinney scales by the

persons who had purchased them, their accuracy and their annual inspection, testing and approval by the City Sealer of Providence, Rhode Island, and also the testimony of the witness King (Record 179), to the effect that he actually adjusted and put in proper order for accurate weighing and price computation one of the Phinney scales which was in the possesion of the Computing Company about the year 1908.

If there is any one thing which is clearly established in the record, it is that the inventor Phinney discovered the importance of having a light-weight cylinder, that he made light-weight cylinders, put them in his scales and sold the scales, that the scales were accurate weighing machines and remained such in active use for many years. Any claim to the contrary is wholly unfounded and contrary to the record.

Claims made by Computing Company that the Circuit Court of Appeals of the Seventh Circuit ever made any finding that the Phinney scale was not practical because it would not weigh correctly or that that court ever held that Phinney's scales would not weigh correctly because of the weight of the revolving drum are equally unfounded and contrary to the record.

The nearest approach to anything in the record affording any pretext for any such claim is the language in the first opinion of the Circuit Court of Appeals already referred to herein, found in the record, page 144 to the effect that though the "paper art" (Phinney's patent No. 106,869 in 1870 and Babcock's No. 421-805 in 1890) had professed to teach practical scale

makers how to build automatic computing scales, still, "when those disclosures were given material bodies, failure was the result."

But a moment's consideration of the state of the record as it then was before the Circuit Court of Appeals will demonstrate that this language has no reference to the scales which Phinney made and sold. The record as made in the District Court in Illinois, and then on appeal before the Circuit Court of Appeals, was absolutely barren of any evidence that Phinney had ever made a scale or that he had ever done anything toward making a scale, beyond the construction of the model which was on file in the Patent Office. This model had a solid wooden block as a cylinder (Record p. 153).

The opinion of the Circuit Court of Appeals now under consideration was rendered in 1913, four years before the Providence depositions were taken and several months before the affidavits which were filed in support of the motion to modify the first mandate of of the Circuit Court of Appeals were brought to its attention. The only information of any kind which had been given to the Circuit Court of Appeals with reference to Phinney *scales* prior to the time this first opinion was rendered, is that found in the petition of Toledo Company for leave to dismiss its appeal as to the Smith Reissue Patent and apply to the District Court to reopen its decree and receive newly discovered evidence with reference to scales made by Phinney. (See Record p. 183.)

The facts as shown by the record are that the Circuit Court of Appeals for the Seventh Circuit had then had no Phinney scales before it in support of a motion or otherwise, had no affidavits before it except the verified petition for leave to dismiss a portion of the appeal, that it had denied this petition, and that it then did what was of course the only thing it properly could do, i. e., decided the case on the record as made in the District Court and brought before it on the appeal, ignoring the allegations in the denied petition; and that its statement that when Phinney's and Babcock's disclosures were given material bodies, "failure was the result," referred not to anything which Phinney had actually done but to Culmer's experiments based on the Phinney *patent* with Culmer's attempted improvements thereon.

We imagine that the Circuit Court of Appeals for the Seventh Circuit would have little patience with any claim, that that court undertook to and did fix the rights of the parties before it, not upon the record which had been brought before it on the appeal, but that it went outside this record and adjudicated, without any evidence upon that subject that the Phinney scales were inaccurate and useless. We submit that there is absolutely no foundation in the record that the Circuit Court of Appeals for the Seventh Circuit has ever held, either before or after examining samples of Phinney scales as manufactured by Phinney, that these scales were inaccurate or failures.

We do not believe the question of Toledo Com-

pany's diligence or lack of it in discovering Phinney scales is here for decision, but believe we should discuss it, inasmuch as the Court of Appeals refer to it in their opinion and, (judging from their brief below), counsel for Computing Company will claim our Ohio bill shows laches.

There is in fact no justification in the record for any claim that the evidence shows that Toledo Company never made any effort to find Phinney scales until 1913, and that when it did make such an effort it found them without any trouble or difficulty, as has been claimed by counsel for Computing Company. On the contrary, the record shows that Toledo Company prior to 1911 made an effort to find any and every computing scale of cylinder construction, or of which it had any information, and that it and others had much trouble in finding any Phinney scales even in 1913 after knowledge had come to it that such scales had once been in use. We have hereinbefore pointed out the allegations of the verified Ohio bill of complaint with respect to the diligent efforts made by the Toledo Company before the first trial in the District Court in Illinois to learn of the manufacture and use of any scale made by Phinney or under his patent.

In addition to those quotations from the record, we desire to direct the court's attention to the affidavits of Mr. Rector and Mr. Davis (Record pp. 392, 278), patent counsel for Toledo Company, with respect to the search for scales which was made by Mr. DeVilbiss under their instructions, and also to the affidavit of

Mr. Henry Theobald, which appears in the record at page 150. In that affidavit he states in part:

> "At the time the aforesaid suits were brought against the defendant company at Toledo, in the year 1907, I caused what I supposed to be a very thorough investigation of the prior art to be made for defenses to the patents upon which we had been sued. The patent affairs of the defendant company were at that time in the immediate charge of Mr. Allen DeVilbiss, since deceased, who was the inventor of the scales manufactured by the defendant company and was at the head of its invention and Patent Department. Mr. DeVilbiss and our patent counsel were instructed to spare no pains or expense in developing all available defenses to the patents upon which we had been sued, and I know that Mr. DeVilbiss made repeated trips to various parts of the country investigating reported defenses, and that our patent attorneys had repeated investigations of the prior art made, both in the Patent Office at Washington and abroad. Still later, after the present suit had been brought in this jurisdiction, we sent a man to New Mexico and to Los Angeles, California, and also to New York and Erie, Pennsylvania, to investigate scales reported to have been manufactured under the Wise patent which is in evidence in the present cause and concerning which scales proofs were introduced. We also sent a man to Pittsburg and Beaver Falls and to St. Louis, Missouri, to investigate other reported scales to the prior art. Altogether, the defendant company spent several thousands of dollars in looking up and investigating reported defenses to the patents here in suit, and I believed and still believe that we

diligently followed up every clew of which we became possessed regardless of trouble and expense. We did not, however, learn anything respecting the manufacture of scales under the Phinney patent which is in evidence in this cause, and the first knowledge of said scales which I have ever had, and which I believe anyone connected with the defendant company has ever had, came to us within the past three months, and was then due, I believe, to the wide advertising which the complainant made of the decree which it had secured against the defendant company in the present cause, and to its suits or threatened suits against other alleged infringers of the patents involved therein. Among such suits or threatened suits was one against the Standard Computing Scale Company of Detroit, which Company had a sales agent at Providence, Rhode Island, who appears to have had knowledge of some of the old scales manufactured by Phinney at Pawtucket, Rhode Island. The counsel for said company made a trip to Rhode Island to investigate the facts, and upon his return advised my company's counsel of the facts he had learned. I thereupon sent our own counsel to Rhode Island to further investigate the facts, with the result that he found them to be as reported and secured the affidavits and exhibits which are now laid before the court."

That Toledo Company was aware of the importance of endeavoring to prove prior commercial usage of a scale having a cylinder similar to that described in the Smith reissue patent or any other patent as distinguishing from commercial usage to defeat the Computing Company's claims, is made abundantly clear by

the testimony and exhibits which it put in evidence. See the testimony of the witnesses on the first trial of the patent case, Holland, beginning at page 523; Chaffee, 581; Shawan, 594; Russell, 599; Culmer, 608; Milburn, 628, 748, 775, 792; Hapgood, 635, 717, 839; Netter, 757; Cartwright, 765; Gardam, 768; Bacon, 810; Davis, 817; Burkholder, 821; Kiser, 830; Reeves, 833; Cross, 852; Poole, 864. It surely cannot be true that Toledo Company deliberately withheld from the court the clear and convincing evidence of anticipation which was furnished by the Phinney scales and at the same time filled up the record with the testimony of more remote devices in an attempt to establish anticipation by others, and it surely cannot be true that while having its men travel all over the country to gather evidence with respect to these remoter devices, it failed to make any effort to find what had been done by Phinney. If it be said that proof that no search for Phinney scales was made is found in the fact, as claimed by counsel for the appellant, that as soon as search was made for Phinney scales, they were discovered, the answer is found in the fact that this claim of counsel is unfounded. Harry B. Sherwood, a man who had personal knowledge of Phinney's activities in the manufacture of scales, says in his affidavit, record 158:

> "About November, 1912, I was requested by Mr. Pagelsen, Attorney for The Standard Computing Company of Detroit, to visit Saugatuck and other places in Connecticut and Rhode Island in an endeavor to locate one of the old Phinney Scales, about which I had told him a short time before. I had been back to Saugatuck on various occasions since leaving the

employ of the Smith factory, and remembered that on one such visit I had seen at the Smith factory one of these old Phinney Scales, along with samples of various other computing scales, in the storeroom at the factory. I at first could not leave my business in Kansas City to make the Eastern trip, but a little later my mother, who had been living at Saugatuck, died, and I agreed to endeavor to find an old Phinney Scale for Mr. Pagelsen on the same trip home. While in Saugatuck I visited the Smith factory late in 1912, but the old Phinney Scale to which I refer was no longer there. *I also inquired about Pawtucket, Rhode Island, and adjacent towns, but was unsuccessful in my effort to locate an old Phinney Scale at that time.*" (Italics ours)

Here we have a man who was actually familiar with the Phinney Scales, knew what they looked like, knew that they had been in use in Pawtucket and adjacent towns, who had formerly lived in that vicinity, who made a search for the express purpose of finding one of these old scales in November, 1912, and could not find one. Surely it is not surprising that the investigators for Toledo Company, who had no knowledge that Phinney had ever made a scale, much less knowledge as to its characteristics or that it was different from the model in the patent office, did not find any Phinney Scales when they made their search, if a man acquainted with the locality and the people and familiar with the scales which Phinney made and the towns in which to look for them was unable to find one.

Thomas Z. Phinney, the son of the inventor, stated in his affidavit given January 2, 1913:

> "I have recently made repeated efforts to locate one of the scales which were put in regular use at places of business where my father sold them, *but I have been unable to locate a single one of them.*" (Italics ours.) (Record 165.)

Here was a man who had actual knowledge of who the former users were, so that without any aimless or wide-spread search he could go directly to the places where the scales had once been in use and in the search which he made (in 1912), he could not find one of them. He says in his affidavit, given December 17, 1921:

> "In the year 1913 I was requested by Mr. Edward N. Pagelsen, Attorney for the Standard Computing Scale Company of Detroit, Mich., to locate a few of the old Phinney Scales, as well as some of the users of such scales. In company with Mr. Marcus C. Shurtleff, the Standard agent at Providence, R. I., I visited quite a number of the old users of Phinney Scales in Providence, Pawtucket, Attleboro, Central Falls and adjacent towns. We learned that practically all of the old scales that had been in actual use had disappeared. Several of the old users informed us that they had been approached some ten years before by a representative of The Computing Scale Company of Dayton, Ohio, who had offered to buy any of the old Phinney Scales which they could learn of. Only one scale was found in Mr. Shurleff's and in my search in 1913 that had been in actual

use for many years, and *this one had been retained only after the owner had refused repeated offers of purchase from the representative of the Dayton Scale Company.*" (Record P. 163)

He says further:

"Since 1913 I have made repeated efforts to locate the scales which were put in regular use at places of business where my father sold them, but with the exception of the scale used by Mr. Tierney, I have been unable to find any of them." (Record P. 166)

Mr. Shurtleff says in his affidavit given December 16, 1921 (Record 168):

"About November, 1912, I was asked by my company to make a search for old Phinney Scales, and accompanied by Mr. Thomas Z. Phinney to a number of stores where Phinney Scales had been in use. Also we visited many people who had at one time used Phinney Scales, but who were now out of business. We found it impossible to locate more than one old Phinney Scale that had been used in weighing meats and groceries, because the old users informed us that many years before—probably some ten years before—the representatives of the Dayton Scale Co.—their names being The Computing Scale Co. of Dayton, Ohio—had made visits throughout this section endeavoring to purchase the old Phinney Scales wherever they could find them. The only scale that we found was kept by the old user only after he had repeatedly refused to sell the scale to the representatives of the Dayton Company. Mr. Phinney later sold me one of the scales which he himself had and I in turn transferred it to The Standard Computing Scale Co."

The record shows that this sample scale which Thomas Z. Phinney had and the scale which The Computing Company had repeatedly tried to buy from Tierney were the only scales which The Computing Company's fraudulent activities had failed to bring under cover.

Mr. Phinney was subsequently able to obtain from Howson & Howson the three scales which he had loaned that firm years before for use in the Philadelphia litigation, but these scales were not then in the possession of Howson & Howson, but were in the possession of Church & Church, the attorneys for The Computing Company in the Federal Scale Company litigation. (Record p. 163) Their office was used by The Computing Company, with entire innocence of any wrong intent on their part as a suitable hiding place for the three Phinney scales which had been obtained by Howson & Howson from Thomas Z. Phinney and used as a defense in the Philadelphia litigation. Church & Church would not of course be parties to the destruction of these scales and upon what pretext The Computing Company caused them to borrow the scales from Howson & Howson, the record is silent, as we have not yet had an opportunity to go into these matters. The Computing Company did all it could to bring about the suppression of these scales and what it was able to accomplish was sufficient to keep the scales off the public record and in the privacy of the offices of its own counsel. No one, who did not run across Thomas Z. Phinney and trace these scales through him, stood any

chance of ever learning of their existence. They were in fact very effectually hidden away, as neither Toledo Company nor The Standard Computing Company learned of their existence until 1913, although both companies were making an active investigation and search for any scale which would be a defense to the Smith Reissue Patent, and the evidence shows very clearly that neither company would have learned of any of the Phinney scales, even in 1913, had it not been for the good fortune of The Standard Computing Scale Company in learning "by accident," as stated by its counsel Mr. Pagelsen in his affidavit (Record 169) of the witness Sherwood. The present record very clearly shows that the claims of counsel for The Computing Company that Toledo Company never made any effort to find the Phinney scales until 1913, and that when it did make such effort it found them without any trouble or difficulty, is unfounded and it may fairly be assumed that when we have an opportunity to examine witnesses and obtain evidence otherwise than by voluntary affidavits that this record will be greatly amplified in this respect, as well as in many others.

It will probably be claimed by counsel for Computing Company that the record shows that the buying up of the Phinney scales was complete before the Toledo Company began its manufacture of cylinder scales and hence could not have been directed against it. But the fact is otherwise, as is shown by

(a) The statements in Koehne's affidavit that Ozias told him that the Computing Com-

pany had made a renewed search for the old Phinney scales before filing this suit against Toledo Company. (Record 385).

(b) The statement in Smith's affidavit that while he was still at the Saugatuck factory Ozias saw the Phinney scale which was in that factory and directed him to send it to Dayton, and that this direction was given "later" than the first search made by the Computing Company for Phinney scales. (Record 166-167).

(c) The affidavit of James A. Coffey (Record 408) that he "was in the years 1909 and 1910 a salesman for The Computing Scale Company of Dayton, Ohio, working out of their Boston office. That while so employed he remembers two old Phinney scales were received at such Boston office from one of the salesmen. He noticed them because of the unusual construction and remembers that they were very similar to the pictures shown on the attached circular. At the time he saw them Mr. O'Neil, of the Boston office, was packing them for shipment to the factory at Dayton. The Boston office was then in charge by Mr. D. J. Moynihan." (The attached circular is one of Phinney's old circulars containing a picture of his scale).

There is much other evidence in the record showing that it is not true that the fraudulent buying up must have been completed by 1905. The claim as heretofore made, however, is unfair in another respect, and that is that it seeks to impress upon the Courts the idea that nothing done by The Computing Company before 1906 could have been directed against Toledo Company because it was not until 1906 that the Toledo

Scale Company began its commercial manufacture of automatic cylinder scales. The record, however, shows that the DeVilbiss patent under which Toledo Company undertook to manufacture automatic cylinder computing scales was applied for on April 9, 1901 (Record Vol. II p. 933). This patent No. 839736 was issued December 25, 1906. (Record Vol. 2, p. 1346). The record does not show the exact date of the assignment of DeVilbiss' rights under his application to Toledo Company, but it does show that assignments have been made by which DeVilbiss' rights have become vested in Toledo Company under its former name, Toledo Computing Scale Company, and that by May 31, 1904, Toledo Computing Scale Company was addressing communications to the Commissioner of Patents with respect to Serial Number 210406, being the serial number under which Patent 839736 was subsequently issued, and was on that date signing its name as "assignee of entire title to application." (Record Vol. II, 943). In 1904 Toledo Company had an exhibit of cylinder scales at the St. Louis Fair (Record Vol. 4, p. 2194). It follows, therefore, that the claim, even if it were supported by the record, that "the whole buying up must have been completed by 1905" is worthless as an attempt to establish that the buying up was not part of a fraudulent conspiracy directed against Toledo Company.

Counsel for Computing Company have heretofore made the claim that the fact that Phinney scales were

available to the defendants in the Philadelphia litigation and in the suit against the Standard Computing Scale Company had nothing to do with the abandonment of The Computing Company's suits against the Federal Scale Company in Philadelphia and the Standard Scale Company in Milwaukee. In the answer of the Computing Company in the Ohio case (Record p. 138) the assertion is made

> "that the said Federal Scale Company's infringement was not of sufficient importance to justify the expense of prosecuting said cause";

and that the action against Randall was not prosecuted

> "for the reason that the infringement did not justify the expense of further prosecuting the same;" (Record p. 138)

and that the suit against the Standard Computing Scale Company

> "was dismissed because the patent sued upon expired September 3, 1912, and the said action and the infringement complained of did not justify the expense of an accounting." (Record p. 141)

It strikes one as somewhat peculiar that The Computing Company should have gone to all the trouble of starting these three suits, and in the Federal Scale Company case at least, have gone to the trouble of taking part in the taking of the testimony of a number of witnesses, before discovering that the infringements were of so little moment as not to justify the expense of the suit. In this connection it should be noted that Mr. Pagelsen, the attorney for the Standard Computing

Scale Company, says in his affidavit (Record 295):

> "My knowledge and possession of the scales manufactured by Phinney became known to the attorneys of The Computing Scale Company, and little, if any, objection was made by them to the reduction of the bond" (given to avoid the issuance of a preliminary injunction) "from $25,000 to $5,000 on my motion. Shortly thereafter and after the decision in the case of Computing Scale Company vs. Toledo Computing Scale Company was affirmed by the Court of Appeals of the Seventh Circuit, the suit against the Standard Computing Scale Company was withdrawn, the plaintiff paying the court costs, without any testimony on the merits and without any hearing."

No reasonable man can draw any other inference, from the action of the Computing Company in these four cases, than that it dropped three of them because the Phinney scales were available as a defense in the trial court, and that it pushed the fourth one, that against the Toledo Company, because its concealment of the scales successfully got it through the trial court without their being available as a defense.

Counsel for Computing Company have claimed that the Phinney scales would not weigh accurately and that therefore they were not an anticipation of Smith's reissue patent. The fallacy in this argument, however, is that the only new thing the court below found in Smith's patent was the light weight cylinder. Even if it were true that Phinney scales, because of faulty bearings or for some other reason, would not

weigh accurately (and the evidence is otherwise), still since the fact is that Phinney anticipated Smith with respect to the light-weight cylinder, Smith's patent is invalid, for it was only upon the finding of the Circuit Court of Appeals that Smith was the discoverer of the necessity for light weight in the cylinder that his patent was sustained.

> "To sustain a generic patent, it is not necessary that the device be a commercial success, and it is enough that the patented machine, though imperfect in operation, embodies the generic principle, and actually and mechanically performs, though in a crude way, the important function by which it makes the substantial change claimed for it in the art."
>
> Hildreth v. Mastoras, 42 Sup. Ct. Rep. 21.

DISCUSSION OF AUTHORITIES PRINCIPALLY RELIED UPON BY COMPUTING COMPANY

The first of these cases we wish to discuss is *Pacific R. R. of Mo. v. Missouri Pacific R. R.*, 111 U. S. 505. This case determines adversely to the Computing Company its contention as to *res judicata*. In that case it appeared that one Ketchum had brought suit against Pacific R. R. of Mo. to foreclose a mortgage in the Circuit Court of the United States for the Eastern District of Missouri. A decree of foreclosure was entered and, on appeal, affirmed by the Supreme Court, *Pacific R. R. v. Ketchum*, 101 U. S. 289. Thereafter Pacific R. R. of Mo. filed a bill in equity in the Circuit Court of the United States for the Eastern District of Missouri of which the Supreme Court says:

> "The main object of the bill was to impeach and vacate, for alleged fraud in fact, a decree made by that court, June 6th, 1876, foreclosing a mortgage on railroad property of the plaintiff and ordering its sale." 111 U. S. 506.

The principal charges of fraud were that the former directors and officers of the Pacific Railroad of Missouri had been interested in certain bonds or obligations of the railroad which had been fraudulently issued, and that they made no contest of the foreclosure suit and caused and permitted a foreclosure decree to be entered by consent. The bill also charged a fraudulent interpolation in the foreclosure decree of certain property which was not, in fact, embraced in the mortgage being foreclosed. The allegations as to the fraudulent transaction were quite lengthy and we are merely stating the more important features thereof.

The defendants demurred to this bill for the reasons, among others: (a) That no leave of the Supreme Court had been obtained for filing it, notwithstanding the decree which it attacked had been affirmed by the Supreme Court; (b) That certain matters in said bill had been adjudicated against the complainant by the Supreme Court on appeal.

In reversing the action of the Court below in sustaining this demurrer, the Supreme Court said:

> "It appears from the report of the case in 101 U. S. 289, that the present plaintiff contended here, that it had not consented to the decree, and sought to examine the question of the alleged fraud or unauthorized conduct of

> its solicitor and its officers, and also sought to defeat the jurisdiction of the Circuit Court, and to attack the propriety of the purchase by the solicitor. The conclusion of this court was, that it could not discover any error that could be corrected by appeal. But, in its opinion, it said: 'The remedy for the fraud or unauthorized conduct of a solicitor, or of the officers of the corporation, in such a matter is by an appropriate proceeding in the court where the consent was received and acted on, and in which proof may be taken and the facts ascertained.' Thereupon, this bill was immediately filed." (111 U. S. 519)

It thus appears that the Supreme Court held that an application to it on appeal to consider claims that the decree before it had been obtained by fraud could not be entertained by it, and that its refusal to entertain such an application did not bar relief because of such fraud, upon a bill subsequently filed in the District Court. This establishes that counsel for the Computing Company are wrong in their contention that the Circuit Court of Appeals for the Seventh Circuit had jurisdiction to entertain an application for relief by Toledo Company based upon the fraud of the Computing Company in obtaining the decree which had been appealed to that court, and further establishes that even if such an application had been made to the Circuit Court of Appeals, the denial of relief by that Court would not bar the present proceeding. At page 520 the Supreme Court said:

> "On the admitted allegations of the bill there was no real defense made in the Ketchum

> suit, and the present plaintiff was prevented from making that defense by the unfaithful conduct of its solicitor and its directors, and the directors of the Atlantic Company. *A case of that kind is one of which a court of equity will take cognizance. United States v. Throckmorton*, 98 U. S. 61." (Italics ours)

It should be noted that the court says that "a court of equity" will take cognizance of such a situation; it does not restrict this language to the court in which the original decree was rendered.

The matter which was troubling the court on the question of jurisdiction was whether a bill of the character which had been filed attacking the judgment which, as the court says, was "an original bill in the chancery sense of the word" (p. 522), could be treated as "a continuation of the former suit, on the question of the jurisdiction of the Circuit Court." The court held that it might be so treated, but nowhere holds or even intimates that it could not, if the plaintiff desired so to do, be filed as a wholly independent suit in any court having jurisdiction of the parties.

If the case just discussed be considered in connection with the case of *Simon v. Southern Ry.*, 236 U. S. 115, all doubt as to the right to plant such a suit in some court other than the one in which the judgment under attack was rendered will be removed. In that case it was charged that Simon was seeking to enforce by levy a judgment that was obtained in a state court by fraud and without notice to the Railway Company. The court said, (page 122):

> "If that be so, the United States courts by virtue of their general equity powers had jurisdiction to enjoin the plaintiff from enforcing a judgment thus doubly void. For even where there has been process and service, if the court 'finds that the parties have been guilty of fraud in obtaining a judgment * * * * it will deprive them of the benefit of it.' *McDaniel v. Traylor,* 196 U. S. 415-423."

Simon contended that Section 720 of the Revised Statutes, which prohibits the United States Court from staying proceedings in any court of the state, applied and that because of that statute the United States Court could not enjoin the proceedings to enforce the judgment of the state court. The Supreme Court, however, overruled this contention, saying in part: (p. 123)

> "In 1793, when that statute was adopted (1 Stat. 334), courts of equity had a well-recognized power to issue writs of injunction to stay proceedings pending in court, — in order to avoid a multiplicity of suits, to enable the defendant to avail himself of equitable defenses and the like. *It was also true that the courts of equity of one state or country could enjoin its own citizens from prosecuting suits in another state or country. Cole v. Cunningham,* 133 U. S. 107. This, of course often gave rise to irritating controversies between the courts themselves, *which could, and sometimes did, issue contradictory injunctions.*" (Italics are ours.)

This language of the Supreme Court, once and for all, forecloses the contention made by counsel for Computing Company that it is an unheard of thing for one court of equity to interfere with the enforcement of the

decree of another court of equity; for, as shown by the Supreme Court, formerly courts of equity often even stayed the further prosecution of *pending proceedings* and, except as restrained by statute or by their own sense of comity, still have and exercise this power. The Supreme Court continues (p. 124):

> "On principles of comity and to avoid such inevitable conflicts the act of 1793 was passed. *Diggs v. Wolcott,* 4 Cranch, 179, 180 (1807) *and Hull v. Burr,* 234 U. S. 712 (1914), (the first and last cases in this court dealing with that question) furnish typical instances in which the statute has been applied. Those decisions, and the authorities therein cited show that although the facts might have been such as to warrant an injunction against a suit then pending in a state court, yet Sec. 720 prevented the Federal court from staying the proceedings in the state court.
>
> "But when the litigation has ended and a final judgment has been obtained—and when the plaintiff endeavors to use such judgment—a new state of facts, not within the language of the statute may arise. *In the nature of the case, however, there are few decisions dealing with such a question.* For where the state court had jurisdiction of the person and subject-matter the judgment rendered in the suit would be binding on the parties until reversed and there would therefore *usually* be no equity in a bill in a Federal court seeking an injunction against the enforcement of a state judgment thus binding between the parties. See *Marshall v. Holmes,* 141 U. S. 600, where *Nougue v. Clapp,* 101 U. S. 551, relied on by Appellant, is discussed." (Italics are ours.)

The court then comes to discuss the very important case of *Marshall v. Holmes,* 141 U. S. 589, hereinbefore cited and relied upon by us and of this case the court says: (p. 125-7)

> "The appellant insists, however, that *Marshall v. Holmes,* referred to as conclusive unless overruled, does not support the jurisdiction of the Circuit Court because there no injunction was granted by the United States court.
>
> "In that case Mrs. Marshall brought a suit, in a Louisiana court, and obtained a temporary injunction restraining Holmes, Sheriff, from levying Mayer's judgments alleged to be fraudulent. Her petition for removal to the United States court was denied and the case proceeded to final hearing in the state court where the temporary injunction was dissolved. That decree was affirmed by the Supreme Court of Louisiana. The case was then brought here to review the order refusing to allow the case to be removed to the Federal court. In discussing that issue the Appellee contended that 'it was not competent for the Circuit Court of the United States, by any form of decree, to deprive Mayer of the benefit of his judgment at law, and that Mrs. Marshall could obtain the relief asked only in the court in which the judgment had been rendered.' In considering that contention (which is substantially the same as that urged by the Appellant Simon here), the court asked 'whether, where the requisite diversity of citizenship existed, the Circuit Court of the United States could not deprive a party of the benefit of a judgment fraudulently obtained by him in a state court?' In answering this question the court pointed out the difference between enjoining a court and enjoining a party;

and the difference between setting aside a judgment for irregularity and setting it aside for fraud. It was held that the case was removable, since, there being diversity of citizenship, the Circuit Court of the United States had jurisdiction to award Mrs. Marshall protection by preventing the plaintiff from enforcing his judgemnts if they were found to be fraudulent in fact, saying that the 'Authorities would seem to place beyond question the jurisdiction of the Circuit Court to take cognizance of the present suit, which is none the less an original, independent suit, because it relates to judgments obtained in the court of another jurisdiction. While it cannot require the state court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a state court. "It would simply take from him the benefit of judgments obtained by fraud.' And if a United States court can enjoin a plaintiff from using a judgment, proved to be fraudulent, it can likewise enjoin him from using a judgment absolutely void for want of service."

The court further said in the Simon case (p. 128)

"The ground of the decision in the *Marshall Case, in Gaines v. Fuentes,* 92 U. S. 10; *Barrow v. Hunton,* 99 U. S. 85; *McDaniel v. Traylor,* 196 U. S. 415; *Arrowsmith v. Gleason,* 129 U. S. 86; *Johnson v. Waters,* 111 U. S. 640; *Sharon v. Terry,* 36 Fed. Rep. 337 cited

> in *Julian v. Central Trust Co.*, 193 U. S. 112; *Dobbins v. Los Angeles*, 195 U. S. 224; *Howard v. DeCordova*, 177 U. S. 609, is that while Sec. 720 prohibits United States courts from 'staying proceedings in a state court,' it does not prevent them from depriving a party of the fruits of a fraudulent judgment, nor prevent the Federal courts from enjoining a party from using that which he calls a judgment but which is, in fact and in law a mere nullity. That conclusion is inevitable, or else the Federal court must hold that a judgment—void for want of service—is 'a proceeding in a state court' even after the pretended litigation has ended and the void judgment has been obtained. Such a ruling would involve a contradiction in terms, and treat as valid for some purposes that which the courts have universally held to be a nullity for all purposes."

The foregoing makes entirely clear the confusion which apparently exists in the minds of counsel for Computing Company, between the rule that one court of equity should not interfere to restrain the prosecution of "proceedings" in another court of equity, and the rule that after the "proceedings" have been ended and resulted in a decree, any court of equity having jurisdiction of the parties may interfere to prevent the enforcement of such decree if it was obtained by extrinsic fraud.

While the *proceedings* are still going on, i. e. before the decree is entered, there is no reason why a new action should be started and some other court of equity appealed to to prevent the further prosecution of the proceedings, because any grounds which might

appeal to such other court for interfering with the prosecution of the proceedings would appeal with equal force to the court of equity in which the proceedings are pending. After the decree has been entered, if the defeated party desires to obtain relief upon the ground of fraud, he must obtain this relief by an original bill, for what he is asserting under all of the authorities is a new and independent cause of action in equity.

There was grave doubt at first as to whether such a new suit was sufficiently connected with the old suit to permit its filing as an ancillary bill in the same court as that in which the decree had been entered, particularly if that court was a Federal court, and under the new bill the requisite diversity of citizenship did not exist. Nobody except counsel for the Computing Company ever seems to have doubted that such a new suit could properly be begun in that particular Federal court in which the proper showing of diversity of citizenship could be made. The doubt arose as to whether it could be brought in the original court as an ancillary suit. Ordinarily, of course, it is more convenient to bring the new suit as an ancillary suit in the court in which the decree was rendered, and so the question has been a number of times presented as to whether such suit might be so begun, and the Supreme Court has held that it may be, but the Supreme Court has never held, that it *must* be so begun and cannot be brought in any other court of equity having jurisdiction of the parties. The Supreme Court has, in fact, repeatedly held, as

hereinbefore shown, that after the original proceedings have terminated in a judgment or *decree,* a "new" suit may be maintained to enjoin the enforcement of such judgment or decree in any court of equity which has or can obtain jurisdiction of the parties, if grounds for equitable relief, such as extrinsic fraud, exist.

The case of *Old Dominion Copper Co. v. Bigelow,* 203 Mass. 159, frequently cited and relied upon by counsel for the Computing Company to sustain the claim that the Circuit Court of Appeals had jurisdiction to enjoin the further prosecution of the suit in the District Court in Ohio, Western Division, is not an authority supporting that claim. In that case, while the cause was pending on appeal and before any decision the appellee attempted to enjoin the appellant by suit in New Jersey from further prosecuting the appeal. Upon application of the appellant one of the judges of the Supreme Court of Massachusetts, acting *under and in pursuance of a state statute* giving a judge of the Supreme Court power to issue an injunction to restrain interference with the conduct of cases pending in the Supreme Court issued an injunction restraining the further prosecution of the case in New Jersey. That case differs from the present not only in that the injunction there was issued by a state statute empowering a judge of the Supreme Court to issue one, but also in that the attempt in the latter suit in New Jersey was *to prevent the parties from obtaining a decision in the earlier suit in Massachusetts,* and further in that the questions raised in New Jersey were questions which

the Supreme Court of Massachusetts had full jurisdiction to consider. Here there is no statute authorizing the issuance of an injunction. There has been no attempt to keep the Computing Company from obtaining the decision of the Circuit Court of Appeals, and the issues raised in the suit in the District Court in Ohio are issues which could not have been raised in or acted upon by the Circuit Court of Appeals. The Massachusetts case is not an authority at all in support of the claim that a court of appellate jurisdiction may or should attempt to take from another court the right to decide whether the decision of such appellate court between the same parties in res judicata with respect to the issues pending in such other court.

It has been claimed by counsel for Computing Company that the case of *Kessler v. Eldred*, 206 U. S. 285, supports their claim that the Circuit Court of Appeals could and should have issued an injunction restraining the Ohio proceeding. That case, however, is not an authority to that point at all. In that case it appeared that Eldred had sued Kessler in the Circuit Court for the District of Indiana for alleged infringement of a patent. The Circuit Court found for Kessler and the Circuit Court of Appeals affirmed that decree. Afterward Eldred filed a bill in the Western District of New York against one of Kessler's customers alleging infringement by the customer of the same patent by using Kessler's device. This suit intimidated many of Kessler's customers to his damage, and Kessler assumed the defense of the suit in New

York. Kessler then brought suit against Eldred in the *Circuit Court for the Northern District of Illinois*, the state and district of Eldred's citizenship and residence, to enjoin Eldred from prosecuting any further suit for alleged infringement by Kessler's device of the patent mentioned.

The Supreme Court upon the certification of three questions to it by the Circuit Court of Appeals held that Kessler was entitled to an injunction as prayed for in the Circuit Court in Illinois. This is an authority which shows that if the Computing Company ever had any right to attempt to interfere with the prosecution of the case in the District Court in Ohio that that right was not by proceeding in the Circuit Court of Appeals, but was by a proceeding in some court of original jurisdiction having jurisdiction of the parties.

One of the cases upon which counsel for Computing Company principally rely to support their claim of *res judicata* not only does not support this claim, as we shall show, but further shows the fallacy of the claim that a state court cannot enjoin the enforcement of a judgment of a Federal court upon which claim is based the further claim that a decree of a Federal Court may not be enjoined by another Federal Court. The case referred to is *Embry v. Palmer*, 107 U. S. 3. In that case a state court of Connecticut enjoined the enforcement of a judgment rendered by the Supreme Court of the District of Columbia. The action of the lower state court was affirmed by the Supreme Court of Connecticut and upon proceedings in error being taken

in the Supreme Court of the United States, that court reversed the courts below, *not upon the ground that the state court was powerless to interfere by injunction with the enforcement of a judgment of a Federal court,* but upon the ground that on the merits of the case as made in the state court plaintiffs in that court showed no fraud on the part of the defendant and showed laches upon their own part. The court said that:

> "No question is made of the right of that court" (the state court) "to entertain the jurisdiction to enjoin proceedings upon the judgment, notwithstanding it was a judgment of a court of the United States. It had jurisdiction of the person of the plaintiff-in-error, who was himself seeking the aid of the courts of that state in his suit at law upon the judgment for the purpose of enforcing it." (p. 13).

It thus appears that the Supreme Court had in mind the question as to whether a state court may enjoin the judgment of a Federal court for fraud and, having that question in mind, proceeded to investigate the merits of the case before it. Manifestly, if the Supreme Court had been of the opinion that the state court had no power to entertain such a bill, it would have said so and would have reversed the Supreme Court of Connecticut upon this ground. It did not do so, and the opinion of the Supreme Court of Connecticut, 46 Conn. 595, therefore stands with at least the tacit approval of the Supreme Court of the United States to the effect that a state court may upon a pro-

per showing of fraud enjoin the judgment of a Federal Court.

The claim is made by counsel for Computing Company that the two applications which Toledo Company made to the Circuit Court of Appeals for leave to apply to the District Court in Illinois to open up its decree and receive newly discovered evidence were really based upon fraud (which claim we have shown to be in fact incorrect), and that the refusal of such leave by the Circuit Court of Appeals constitutes *res judicata* in the present suit to enjoin the decree for fraud.

They have always heretofore placed great reliance on the case of *Embry v. Palmer* 107 U. S. 3, claiming that that was a case in which the unsuccessful party in an action at law made a motion within the term for a new trial on the basis of newly discovered evidence, and that the Supreme Court held that the decision of that motion was *res judicata* and that the judgment could not be set aside in an action in equity, based on fraud and concealment of such evidence.

Embry v. Palmer announces no such doctrine as that just stated.

The real facts about *Embry v. Palmer* are that Embry as administratior of an attorney obtained a judgment in the District Court of Columbia against Stanton and Palmer on a *quantum meruit* for professional services rendered. This judgment was affirmed by the Supreme Court. Subsequently Embry sued Stanton and Palmer on this judgment in the Superior

Court in Connecticut. Thereupon the defendants filed their petition in equity in the Superior Court to restrain him from prosecuting this action upon the judgment or in any manner enforcing it. It was made to appear in this suit that Stanton and Palmer had had a contract with Embry's decedent by which the decedent was to receive as his compensation only five per cent. of an amount which he recovered for them from the United States Government; that after Embry's appointment as administrator he made a demand for payment of Stanton and Palmer's debt to his decedent, showing that the amount claimed by him, i. e., $2,296.25, was five per cent. of the amount which Stanton and Palmer had received on their claim against the Government; that, after presenting this claim, Embry brought suit on it in the State Court in Connecticut; that the declaration there contained a special count for a commission of five per cent., also general counts upon a *quantum meruit,* demanding $10,000; that he withdrew this suit and filed one in the Supreme Court of the District of Columbia in which he filed a bill of particulars showing that the claim was for services rendered in the prosecution of the claim against the Government, but claiming $10,000.00 instead of $2,296.25, which was the amount of his original bill figured on the five per cent. basis; and that upon the trial Embry recovered a judgment for $9,185.18. It was to enjoin the enforcement of this judgment in so far as it exceeded $2,296.25 that the cross bill was filed in the state court in Connecticut.

We have taken the foregoing facts from the opinion of the Supreme Court of Connecticut in *Stanton v. Embry*, 46 Conn. 595.

The Supreme Court of Connecticut held that Embry's decedent, if living,

> "would have had no right to ask for or take a judgment for more than five per cent.; if he had offered, either in the presence or absence of the petitioners, evidence in support of the count upon a *quantum meruit*, it would have been the suggestion of a falsehood, for by his contract he had barred himself from making that claim in any form or for any reason." (p. 600)

That court accordingly held that that portion of the judgment in excess of $2,296.25 should be enjoined.

When the case reached the Supreme Court of the United States that court held that the test of the propriety of the action of the state court was to be found in the question,

> "What causes would have been sufficient in the District of Columbia, according to the law then in force, to have authorized its courts to set aside the judgment recovered there by Embry against Stanton and Palmer?" (Opinion, p. 10)

In discussing the merits of the contentions presented by the parties, the Supreme Court said, (p. 14-15):

> "It is admitted, however, that the plaintiff-in-error did not know of the alleged special contract; that he did not intend to give to the de-

> fendants-in-error any assurances on the subject, and that he did not know that they were relying upon what they now allege has misled them. ***In all this there is certainly no fraud: in fact, there is not enough to suggest a fault on the part of the plaintiff-in-error.***" (Italics are ours)

Here is the first plain and vital distinction between *Embry v. Palmer* and the case at bar. There the Supreme Court says there was no fraud. Here the record shows fraud of the most vicious character. The Supreme Court says further, (p. 15-16):

> "There were two letters from Atkinson to the defendants-in-error in *their* possession, *not known to the plaintiff-in-error,* expressly referring to the special agreement as fixing the rate of compensation, which might have been produced on the trial, but were not. They had escaped the recollection of the active partner, Stanton, who, for the preparation of the defense, had placed in the hands of his counsel in Washington all the papers which he supposed related to the subject of the suit. The letters referred to were not found by him until after the trial and disposition of the case in the Supreme Court of the District of Columbia. It is entirely clear from this statement that the defendants-in-error are chargeable with carelessness and want of diligence in not making and sustaining the defense on the ground of an express agreement for a fixed rate of compensation." (Italics are ours)

Here is another vital distinction between the case of *Embry v. Palmer* and the case at bar. There the claimed newly discovered evidence was in the posses-

sion and under the control and within the knowledge of the parties who were seeking relief because it was not used in the original trial and the successful party in the original trial was without knowledge of this evidence. In the case at bar Toledo Company, the defeated party in the original trial, had no knowledge of the existence of the newly discovered evidence, had none of it in its possession, and such evidence was, in fact, in the possession and under the control of the Computing Company, the successful party in the original trial, as a result of its own deliberate plan and conspiracy to suppress the same.

The Supreme Court further says (p. 16-17.)

> "The question whether there was not a special agreement limiting the compensation, as appears by the record in the case, was left to the jury upon evidence submitted. It was one of the points of the issue, and was so regarded by both parties. The counsel for the defendants-in-error asked an instruction to the jury on the subject, and the court did instruct the jury in reference to it."

Here is another vital distinction between that case and the case at bar. In the present case there was no issue in the evidence before the District Court in Illinois as to whether Phinney's commercial practice anticipated Smith and that Court, of course, could not and did not decide this question.

The Supreme Court further says (p. 17):

> "After the verdict, a motion for a new trial

> was made on two grounds, first, that the damages were excessive, and second, 'That since the trial evidence vital to the case has been discovered.' That motion was overruled, and an appeal was taken to the General Term, where the judgment was affirmed. The motion for a new trial does not disclose what new evidence had been discovered, nor was any affidavit filed setting out its materiality, the circumstances of its discovery, and the reasons why it could not have been produced at the trial. There is no reason to doubt but that the evidence in question consisted of the very letters referred to."

The Supreme Court says (p. 17) that during the interval between the filing and the overruling of the motion for a new trial

> "There was ample time in which to present the facts and the application, and all illusions as to the intentions of the plaintiff-in-error had been dispelled by the trial and verdict. If it was not brought forward, it was from pure neglect. If it was, as it appears to have been, a court of competent jurisdiction has passed upon the very matter sought to be again litigated in the courts of Connecticut. The judgment of the Supreme Court of the District of Columbia refusing to grant a new trial was final."

The fourth vital difference between the case of *Embry* v. *Palmer* and the case at bar is thus made apparent, that is, that the discovery of the new evidence was made while the case was yet pending in the trial court and an application was made to that court to grant a new trial because of newly discovered evidence,

and as the evidence was in the possession and control of the applicants, it was either presented to the trial court on this motion or should have been so presented, and that court after hearing the motion for a new trial proceeded to enter judgment. In the case at bar the newly discovered evidence was never discovered until the case was out of the trial court; Toledo Company has never had an opportunity to present this evidence to the trial court, and its effect upon the rights of the parties upon the merits of their controversy has never been considered by any court.

Our case would be analogous to *Embry* v. *Palmer* (a) if Phinney scales had been in the possession of Toledo Company at the time of the first trial of the patent case instead of in the possession of the Computing Company; (b) if Toledo Company had forgotten or overlooked the fact that it had this evidence until after trial upon the merits had been had; (c) if Toledo Company had then, before appeal, filed a motion for a new trial or a rehearing in the District Court in Illinois based on the Phinney scale evidence, and that court had denied the application either after seeing and considering the evidence or because of failure of Toledo Company to produce it even then; and (d) if, after all this had taken place in the trial court and final decrees entered and affirmed, Toledo Company had then brought the present suit to enjoin enforcement of the decree in the original suit, alleging the facts just stated and alleging no facts constituting fraud upon the part of the Computing Company. The differences between the

facts upon which the Supreme Court acted in *Embry v. Palmer* and those in the case at bar are so many and so radical and the rules of law applicable to that case and to this are so different that it is difficult for us to understand how it can be claimed by any one that that case has any application to this.

Another case upon which much reliance is placed by counsel for appellant is *Central National Bank v. Stevens*, 169 U. S. 432. In the brief in the Circuit Court of Appeals for the Sixth Circuit, counsel for the Computing Company make the admission "that there is some authority that such a bill will lie in the Federal Court to set aside the decree of a state court for extrinsic fraud." But they say, (p. 40), that *Central National Bank* v. *Stevens* holds, "that a state court has no like power to set aside for fraud the decree of a Federal Court of Equity." (This in support of an argument that a Federal Court cannot enjoin enforcement of a decree of another Federal Court.)

That case does not so hold. The Supreme Court says (p. 464):

> "In the present case, no fraud of any kind is imputed to the plaintiffs in the Circuit Court of the United States, nor is it alleged that the action or proceedings in that court were founded in any mistake of facts, or were influenced by any misrepresentation or fraud practiced upon the court. But the purpose of this suit was to practically nullify the proceedings in the Circuit Court, and to enjoin the suitors therein from pursuing their remedy in that court, not for any fraud of theirs used in

> promoting their cause, but for the alleged fraud of other parties in another court, and in a case in which these appellants were not parties."

Manifestly, a case wholly unlike our Ohio case. The Supreme Court itself distinguishes that case from one like the case at bar, saying (p. 463-4):

> "This view does not overlook the decision of this court in *Marshall* v. *Holmes,* 141 U. S. 589, where it was held that a Circuit Court of the United States, in the exercise of its equity powers, and where diverse citizenship gives jurisdiction over the parties, may deprive a party of the benefit of a judgment fraudulently obtained by him in a state court, if the circumstances are such as would authorize relief by a Federal court if the judgment had been rendered by it and not by a state court. There the suit to restrain the owner of the judgment from enforcing it was brought in the state court that had rendered the judgment, and was removed into the Federal court on the ground of diverse citizenship, and it was sought to impeach the judgment for the fraud of the party who procured it."

The last sentence above quoted might appear to give some foundation for the claim that counsel for Computing Company make, that *Marshall v. Holmes* is to be distinguished from our Ohio case because there the suit to enjoin was brought in the state court in which the original judgment was rendered and then removed to the Federal Court. But this court in *Simon* v. *Southern Ry.,* 236 U. S. 115, 127 has ruled adversely to this claimed distinction.

> "The appellant Simon further contends that *Marshall* v. *Holmes* is not applicable here because that was a removal case; and it is urged that even if a Federal court can grant an injunction in a case removed, it cannot award the same relief in a bill originally brought in the Federal court. ***But that is a clear case of distinction without a difference and was not the basis of the decision.***" (Italics are ours)

Another case relied on as an answer to our claim that the Ohio bill alleges extrinsic fraud is the case of *Wood v. Carpenter,* 101 U. S. 135, 143.

But on the contrary, that case shows the distinction between the case made by the bill of complaint in the Ohio suit and the utmost which could have been claimed for the affidavits filed in the Circuit Court of Appeals for the Seventh Circuit. The Supreme Court said (p. 143):

> "Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry."

The most that the affidavits filed in Chicago showed was silence on the part of the Computing Company with respect to its knowledge of Phinney's commercial practice, whereas the bill and affidavits in the Ohio case show "a trick or contrivance", in that they show a deliberate purchase and suppression of all of the Phinney scales which had been sold to users, for the purpose of keeping Toledo Company (a) from learning that there ever had been such scales, and (b)

from obtaining possession of any of them if it should receive such knowledge; and also show the purchase of the silence of witnesses, the making of an arrangement to withdraw court records from the files and keep them out of public view, the abuse of the confidence of honorable counsel by causing their office to be used as a place of concealment for certain of the scales without their knowledge of the wrongful purpose, the withholding from other counsel of knowledge in the possession of the Computing Company that the evidence with which they were furnished by the Computing Company was false and that the courts were being deceived by the introduction of such evidence, and the discharge from the litigation of all counsel who had knowledge of the Phinney scales. If these do not constitute tricks and artifices, it would be difficult to conceive of a state of facts which would.

It has been claimed by counsel for Computing Company, that Koehne's affidavit as to the statements made by Ozias, the general manager of the Computing Company, as to his belief that the Smith patent was invalid because Phinney's commercial practice had anticipated it, and as to what Ozias was doing and causing to be done in the way of suppressing the Phinney scales, is incompetent, and that such statements are not competent as admissions, for the reason that an admission of an officer of a corporation, to be admissible against the corporation, must be made by the officer in or about the business of the company

and *must be against the interest of that company at the time the admission is made.* (Italics are ours.)

That these admissions were made in and about the business of the company, clearly appears from Koehne's affidavit, Record p. 380 et seq., as that affidavit shows that Ozias' statements were made in the course of carrying out the conspiracy against Toledo Company in which Ozias and Koehne were both taking part on behalf of the Computing Company. The claim that the admissions, to be admissible, "must be against the interest of that company at the time the admission is made" is erroneous. In Jones' Commentaries on Evidence, Vol. II, page 363, it is said:

> "Nor is it necessary that the statement should, *at the time of making it,* appear to be against the interest of the party. The statement is admissible *if at the time of the trial it is inconsistent with the contention of the party who made it.*" (Italics are ours.)

In Wigmore on Evidence, Vol. II, Sec. 1048, page 1217, it is said:

> "Thus, in effect, and broadly, *anything said by the party may be used against him as an admission,* provided it exhibits the quality of inconsistency with the facts now asserted by him in pleadings or in testimony. It follows that the subject of an admission is *not limited to facts against the party's interest at the time.*" (Italics are ours.)

Moreover, if Koehne's testimony as to what was said by Ozias was not admissible under any other

rule, it would be admissible as a statement of one of the co-conspirators made in carrying on the conspiracy. The bill of complaint alleges that the conspiracy against the Computing Company was one to which the plaintiff and "its officers and directors and Moneyweight Scale Company were parties." (Record, p. 14). As stated in Jones' Commentaries on Evidence, Vol. II, page 437, Sec. 254:

> "When a conspiracy is shown, the acts and declarations of each conspirator in furtherance of the common object are admissible against the others."

There can be no doubt, therefore, that Koehne's affidavit as to the admission by Ozias is competent evidence, and it cannot be made incompetent by counsel's mere dictum to that effect, nor by the repetition of the statement that Koehne's affidavit consists largely of "bald conclusions," which we find made seven or eight times in counsel's briefs.

IX. All Questions Which Were Before The Circuit Court Of Appeals For The Seventh Circuit On Either Of The Two Appeals Are Now Before This Court For Review.

Granting, for the sake of the argument, that the Circuit Court of Appeals for the Seventh Circuit was, under the rule of the law of the case, unable upon the second appeal to it to consider the new evidence in that record showing Smith's anticipation by Phinney, this Court is under no such restriction. Neither is this

Court in any respect restricted in the consideration of this evidence by its refusal to entertain the first petition for certiorari. This precise question has been before this Court in *Hamilton Shoe Co. v. Wolf Brothers,* 240 U. S. 251, in which the Court said in part (p. 257):

> "It is contended that this question is settled otherwise, at least as between these parties, by the decision of the Circuit Court of Appeals on the first appeal and our refusal to review that decision upon complainant's petition for a writ of certiorari, and that the only questions open for review at this time are those that were before the Court of Appeals upon the second appeal. This, however, is based upon an erroneous view of the nature of our jurisdiction to review the judgments and decrees of the Circuit Court of Appeals by certiorari * * * *
>
> "It is, of course, sufficiently evident that the refusal of an application for this extraordinary writ is in no case equivalent to an affirmance of the decree that is sought to be reviewed. And, although in this instance the interlocutory decision may have been treated as settling 'the law of the case' so as to furnish the rule for ~~and~~ de guidance of the referee, the District Court, and the Court of Appeals itself upon the second appeal, this court, in now reviewing the final decree by virtue of the writ of certiorari, *is called upon to notice and rectify any error that may have occurred in the interlocutory proceedings.*" (Italics are ours.)

Hamilton-Brown Shoe Co. v. Wolf Brothers was a suit for unfair competition and infringement of trademark. The District Court denied the plaintiff relief

on both branches of the case, but upon appeal from its decree the Court of Appeals held the plaintiff entitled to relief against defendant's unfair competition, but declared the trademark invalid. Plaintiff petitioned this court for a writ of certiorari, to review the decision and decree of the Court of Appeals, but the petition was denied. Subsequently, following the decision of the Court of Appeals upon an appeal from the final decree of the District Court, this Court granted a writ of certiorari to review the case, and held, upon such review, that it could and should consider the entire record in the case and correct any error that appeared therein at any stage of the proceedings, with the result that it not only affirmed the decree against unfair competition, *but held the trademark valid and infringed.*

Applying the rule announced in the case just cited to the present litigation, it follows that this Court may properly consider all the questions, including the patent and accounting questions, which are presented by the record now before it.

That this Court may, and in pursuance of its ordinary practice, will, pass upon all of the issues above mentioned is made clear by the case just cited; and that it will be in no way embarrassed in considering the new evidence is made clear by its decision in *Messenger v. Anderson,* 225 U. S. 436, in which this Court said (p. 444):

> "The judgment of the lower" (state) "court was pleaded, but it was held by the Circuit

> Court of Appeals after the affirmance by the Supreme Court" (of the state) "that its own previous decision was the law of the case and that it was not at liberty to reverse the judgment even if the matter was *res judicata* on the principle laid down in *New Orleans v. Citizens' Bank*, 167 U. S. 371, 396. See *Parrish v. Ferris*, 2 Black, 606. In the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the latter action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to re-open what has been decided, not a limit to their power. *King v. West Virginia*, 216 U. S. 92, 100, *Remington v. Central Pacific R. R. Co.*, 198 U. S. 95, 99, 100. *Great Western Telegraph Co. v. Burnham*, 162 U. S. 339, 343. *Of course this court, at least is free when the case comes here. Panama R. R. Co. v. Napier Shipping Co.*, 166 U. S. 280. *United States v. Denver & Rio Grande R. R. Co.*, 191 U. S. 84." (Italics are ours.)

If it be claimed by the Computing Company, as it has claimed elsewhere, that nothing has been brought before this court by the present petition for certiorari except the proceedings had upon and after the filing in the court below of that company's petition for injunction against the Ohio suit for the reason that the petition for certiorari was not filed within three months after the accounting decree was entered by the Circuit Court of Appeals, the answer is that this claim is based upon a misconception of the record. The fact is that the opinion which was filed by the Circuit Court

of Appeals, March 25, 1922 (Record p. 489) orders the entry of its final decree upon

a. The patent issues.
b. The accounting issues.
c. The supplementary issues regarding the Ohio case.

This is made clear by the following facts.

The interlocutory decree of the District Court, adjudging validity and infringement and referring the case to a Master for an accounting, was entered on May 6, 1914, (Record p. 1454) and the first paragraph of the decree read as follows:

> "I. That reissued Letters Patent No. 11,536 granted April 28, 1896 to Albert U. Smith and Edwin C. Smith as assignee of an undivided one-half interest thereof, upon the application of Albert U. Smith and as assignor of an undivided one-half interest thereof to Edwin C. Smith, is good and valid in law."

The final decree of the District Court, after the accounting, was entered on March 5, 1919, (Record p. 2860) and the first paragraph of that decree read as follows:

> "1. That the interlocutory decree heretofore entered in this cause on the 6th day of May, 1914, be and the same is hereby made the final decree in this cause with respect to the matters decreed in said interlocutory decree."

The opinion of the Circuit Court of Appeals filed March 25, 1922 concludes:

> "Unless the mandate which we now formulate be stayed on Toledo Company's motion filed within five days, the clerk is directed to issue and to transmit to the court below the following mandate: (1) *Enter of record our affirmance of the final decree of accounting;* (2) Enjoin Toledo Company from further maintaining its Ohio bill and from filing elsewhere any similar bill; (3) Enter summary decree against the sureties on the supersedeas bonds for the amount due upon the accounting decree, including all costs in both courts, but not exceeding the penalties of the bonds; (4) Ascertain Computing Company's expenses in this matter, including reasonable attorneys fees, paid or incurred since the Supreme Court's denial of the petition for writ of certiorari on January 9, 1922, and enter summary decree therefor against Toledo Company, but not against the sureties on the supersedeas bonds. So ordered." (Record p. 488.)

It was with reference to this order that Toledo Company applied for and the Court granted a writ of certiorari. In its petition Toledo Company requested:

> "That the certified record filed herein with petitioner's petition of certiorari, which was denied on January 9, 1922, and the printed copies thereof now on file in this Court, be refiled in connection with this petition." (Petition for Certiorari, page 2.)

In the prayer of its petition for certiorari, Toledo Company prayed that a writ of certiorari might be issued:

> "Commanding said court to certify and send to this court a full and complete transcript of the record of all proceedings in this cause subsequent to the order in this court, denying petitioners former petition for writ of certiorari made and entered January 9, 1922, and should this court determine it necessary, commanding said Circuit Court of Appeals also to certify and to send to this court a full and complete transcript of the record of all other proceedings in this cause *to the end that said cause may be reviewed and determined by this court as provided by law,* and that your petitioner may have such other and further relief as to this court may seem appropriate and be in conformity with law." (Petition for Certiorari, p. 36.)

The controlling statute is, of course, Section 240 of the Judicial Code which provides:

> "In any case, civil or criminal, in which the judgment or decree of the Circuit Court of Appeals is made final by the provisions of this title, it shall be competent for the Supreme Court to require by certiorari, or otherwise, upon the petition of any party thereto any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court."

It is the "case" which is brought up by a writ of certiorari—not some particular question or questions as counsel for appellants contend, and when the writ is granted, the case is in the Supreme Court "for its review and determination", with the same power and

authority as if the case "had been carried by appeal" to the Supreme Court.

The final decree in the Seventh Circuit was that contained in its opinion of March 25, 1922, from which we have hereinbefore quoted. That court itself undertook to justify its accepting jurisdiction of the supplementary proceedings attacking the Ohio suit on the ground that the proceeding presented ancillary questions "bearing on the correctness and justice of the mandate to be entered." (Record p. 482.)

The Circuit Court of Appeals also said:

> "We believe that the petition and response now before us require us to formulate a mandate, which to our view will do justice between these parties. Although Toledo Company's response does not contain a prayer *for the opening of the final accounting decree, the subject matter invites our attention as if a cross petition had been filed.*" (Record p. 486.)

This language, coupled with the form of the mandate which the Circuit Court of Appeals ordered to be transmitted to the court below makes it perfectly clear that the Court of its own motion re-opened its final decree, so as to include in it the drastic provisions against Toledo Company and the bonding companies in addition to the affirmance of the accounting decree. It was with respect to this final decree that the Toledo Company petitioned for writ of certiorari and, as hereinbefore shown, the prayer of the petition was in the alternative, praying that the Court of Appeals be commanded "to certify and send

to this court a full and complete transcript of the record of all proceedings in this cause subsequent to the order of this court denying petitioner's former petition for certiorari made and entered January 9, 1922", or, in the alternative, "should this court determine it necessary, commanding said Circuit Court of Appeals also to certify and send to this court a full and complete transcript of the record of all other proceedings in this cause to the end that said cause may be reviewed and determined by this court as provided by law, and that your petitioner may have such other and further relief as to this court may seem appropriate and in conformity with law." The writ issued by this court upon this petition refers to the pendency on appeal of a suit, "Number 2784, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Northern District of Illinois," and commands that the Circuit Court of Appeals for the Seventh Circuit send to the Supreme Court "the record and proceedings in said case", (Record p. 496), clearly meaning and so understood by the Court below and the parties, the whole record, including both appeals and the supplementary proceedings, all of which has been printed and is now before this court as the return to the writ.

We shall proceed in the second section of this brief to present for the consideration of the court our contentions as to the patent and accounting questions, to which we most earnestly request the court's atten-

tion, as we believe that the courts below have been wrong from the beginning in holding the Smith patent to be valid and in holding the Toledo Company to any liability as an infringer thereof, and that the litigation between the parties should now be determined by this Court on the merits (including the Phinney scale evidence), and ended once for all.

If this Court should find the Smith reissued patent to be invalid, for any of the reasons advanced, it would render the consideration of any other questions unnecessary. A determination of those questions is a comparatively simple matter, and would involve a consideration of but a very small part of the voluminous record which is before the Court, since more than four-fifths of that record relates to the accounting proceedings and the supplemental proceedings following the decision of the Court of Appeals on the appeal subsequent to those proceedings. The original record before the Court of Appeals, on the appeal from the interlocutory decree, was contained in a single volume and included all of the evidence (except the Phinney scale evidence) relating to the questions of validity and infringement of both the Smith reissued patent and the additional patent originally sued on, and later held invalid by the Court of Appeals.

The evidence respecting the Phinney commercial scales, which Toledo Company asserts constitute a complete anticipation of the claims of the Smith patent, is fully before this Court both upon the testimony of witnesses who were cross-examined at length by Com-

puting Company's counsel, (Record pp. 2549-2674) and in the form of numerous samples of the Phinney scales themselves. We contend that the Smith reissued patent is invalid upon the face of the patent itself—in view of its own statements respecting the nature of the alleged invention and its express recognition and disclaimer of the prior art—and the Court may (and we respectfully submit should) find the patent invalid for lack of patentable invention without going further, but even if it should consider the entire record relating to this question, including the evidence respecting the Phinney commercial scales, it would be a brief and simple matter.

We are of course aware of the fact that in Westinghouse v. Wagner, 225 U. S. 604 this court declined to review the finding of the Court of Appeals upon the question of infringement and confined itself to a review of the accounting proceedings, saying (p. 613):

> "The statute makes the decision of the Circuit Court of Appeals final in patent cases, and the plaintiff's petition for the writ of certiorari herein was not granted for the purpose of reexamining the court's ruling that defendant's Type M Transformer was not an infringement of Claim 4 of the Westinghouse patent. The writ was issued in view of the holding that, though the Master found that the defendant had made a profit of $132,000 from the sale of infringing transformers, the plaintiff could yet only recover $1 because it failed to separate the profits made by its patent from those made by the defendant's addition."

But the same statute which makes the decision of

the Circuit Court of Appeals final in patent cases also makes its decisions final in trademark cases and in cases where the jurisdiction of the court depends upon diverse citizenship of the parties (See 128 Judicial Code); and yet in the later case of *Hamilton-Brown Shoe Company vs. Wolf Brothers,* 240 U. S. 251, *supra,* a suit based upon trademark and unfair competition, this court *did* review and determine the question of the validity of the trademark, although its writ of certiorari was granted primarily with reference to the accounting proceedings. Indeed, there the application for the writ was made by the defendant, and the court states in its opinion that the "complainant is not attacking the decree". (p. 260) The trademark had been held invalid by both the District Court and the Court of Appeals, and yet, notwithstanding the fact that the complainant was not attacking the decree under review, this Court considered and determined the question of the validity of the trademark, and held it to be valid.

See also:

Panama R. R. Co. v. Napier Shipping Co., 166 U. S. 280, 283.
United States v. Denver & Rio Grande R. R. Co., 191 U. S. 84, 93.
Lutcher & Moore Lumber Co. v. Knight, 217 U. S. 257, 267.

Panama R. R. Co. v. Napier Shipping Co., supra, was a libel in admiralty to recover damages for injuries to a vessel owned by the libellant. The facts of the

case and the ruling of the Court are stated in the syllabus as follows:

> "The libel in this case was dismissed by the trial court. Judgment of that court was reversed by the Court of Appeals, and the case was remanded for assessment of damages. After assessment and decree it was again taken to the Court of Appeals, where the decree of assessment was affirmed, whereupon a writ of certiorari from this court was granted. *Held*, that, upon such writ, the entire case was before this court for examination."

In answer to the contention that the court should confine itself to a review of the assessment of damages, the court said: (p.284)

> "If, under such circumstances, this court were powerless to examine the whole case upon certiorari, we should then be compelled to issue it before final decree, whereas, as was recently said in the case of *The Conqueror, ante,* 110, it is and generally should be issued only after a final decree."

So, in the case now before the Court, if the contention be sound that the court may not consider the questions of validity and infringement of the patent in suit, it would follow that the Court could have considered those questions only on certiorari granted prior to the final decree of the Court of Appeals, whereas the rule, as stated, is that the writ would usually be granted only after final decree.

The court has the complete record now before it, and we respectfully submit that it should consider and

determine the questions of validity and infringement of the patent in suit which lie at the very foundation of all of the proceedings in the case. To assist it so to do we shall discuss those questions in the next succeeding section of this brief.

BRIEF ON PATENT AND ACCOUNTING QUESTIONS

THE SMITH REISSUE PATENT IN SUIT IS INVALID FOR LACK OF PATENTABLE INVENTION OVER THE PRIOR ART

The Patented Invention

Claims 5 and 6 of the Smith reissued patent in suit, which are the only claims in issue, do not relate to or purport to cover the complete automatic computing scale disclosed in the patent (as do the preceding claims of the patent) but on the contrary, relate to and purport to cover a mere improvement in one single element of said scale, to-wit, the rotary indicator drum or cylinder in the upper part of the scale, upon which the weight and price figures are placed. Automatic computing scales identical with that of the patent in suit in purpose and function and mode of operation and results, and substantially identical with it even in details of mechanical construction, were old in the art, as evidenced, for instance, by the patents to Phinney and Babcock hereinafter referred to, and the patented improvement consisted merely in making the rotary drum or cylinder of such scales of lighter materials than those of which the patentee believed them to have been made before.

Upon the sheet here inserted is shown a reproduction of the drawing of the Phinney patent, of the prior art, and beside it a reproduction of Fig. 1 of the drawings of the Smith patent in suit, to which latter has been

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W. H. PHINNEY.

SCALE FOR SHOWING WEIGHT AND PRICE.

No. 106,869. Patented Aug. 30, 1870.

Fig. 1.

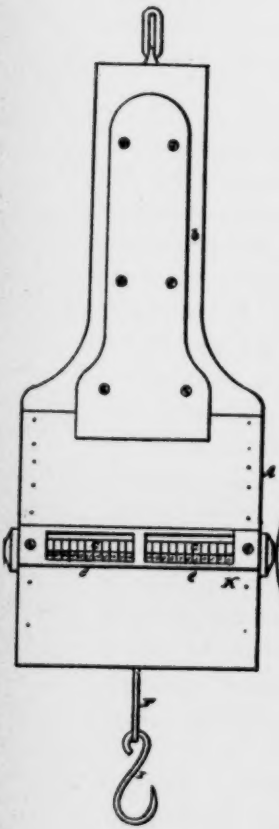


Fig. 2

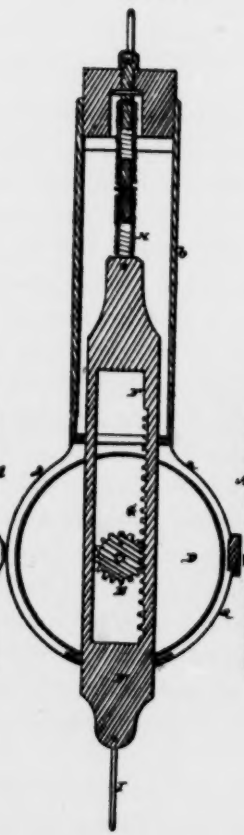


Fig. 3.

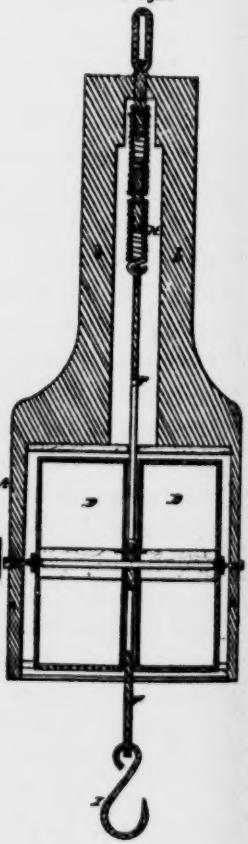
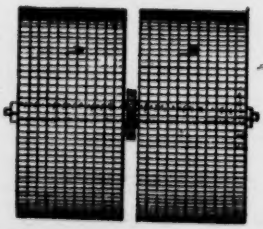


Fig. 4.



Witnesses

S. N. Piper

J. Abbott

William H. Phinney

By their attorneys

H. Haley.

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4 Sheets—Sheet 1.

A. U. SMITH.

AUTOMATIC COMPUTING SCALE.

No. 11,536. Reissued Apr. 28, 1896.

Fig. 1.

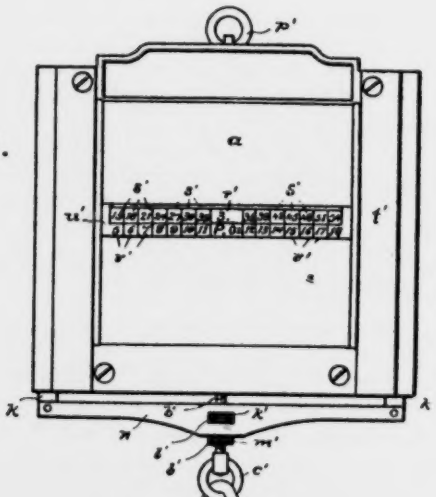
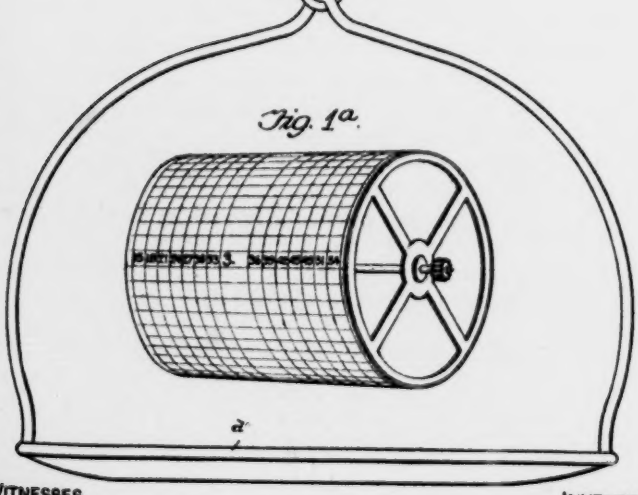


Fig. 1a.



WITNESSES

H. A. Lamb.

S. P. Richardson.

INVENTOR

Albert U. Smith

By A. M. Wooster

added, as Fig. 1a, a perspective view of the indicator drum or cylinder of the scale, removed from its casing. The two claims in issue relate to this drum or cylinder alone, and read as follows:

> "5. An indicator-drum for weighing mechanism consisting of a spindle provided with a plurality of skeleton frames *of light material* and secured to said spindle, and having secured to their peripheries a sheet of paper forming a cylinder.
>
> 6. An indicator-drum for weighing mechanism, consisting of a spindle provided with a plurality of skeleton discs or frames *of thin aluminum* having a sheet of paper extending around and secured to their peripheries to form a cylinder." (Italics ours.)

The patent purports, on its face, to cover mere improvements in an old type of automatic computing scale, the title of the invention not only being given in the specification as "Improvements" in automatic computing scales, but the patentee stating the nature and object of his invention, in the first two paragraphs of his specification (Record p. 1172), as follows:

> "My invention relates to certain new and useful improvements in weighing scales whereon the weight and selling price of a commodity may be ascertained at a glance without any mental calculation on the part of the person using the same, but particularly resides *in the details of construction and combination of elements*, as will be fully hereinafter described and specifically pointed out in the claims.
>
> The object of my invention is to provide

> scales of this description *which shall be extraordinarily sensitive to weights of small amount* and to accurately register the same." (Italics ours.)

At a later point on the same page of his specification (lines 85 *et seq.*) the patentee further recognized and acknowledged the fact that automatic computing scales of the same type and character as his were old in the art, saying:

> "It is a very essential feature that the indicator drum in scales of this nature should be made of very light material, for the reason that if it be not so made the sensitiveness and accuracy of the scale will be more or less affected. For instance, heretofore in scales of this character if a given quantity is weighed successively a number of times it will be found that said scales scarcely ever indicate the weight of such quantity twice exactly the same, there always being some slight variation in the amount registered. This is in a great measure due to the fact that the more the actual weight of the indicator drum itself the greater must be the force necessary to operate it, and in order to overcome this disadvantage I have constructed the drum of thin skeleton frames of aluminum, while the periphery is formed of a thin sheet of paper pasted to the frames. In this way I have secured a structure that is so light that the force necessary to operate it is almost insignificant."

And finally, at the end of his specification (p. 2, ll. 96-101), he inserted the following express disclaimer respecting the prior art:

> "I am aware that computing scales have heretofore been constructed wherein a drum or cylinder is employed having the divisions of the weight-scale and other figures on its periphery, whereby the total selling price of an article may be determined without mental calculation on the part of the operator, and I am also aware that said drum has been operated by a rack-bar and pinion, and I therefore do not broadly make any claim to these features; but
>
> What I do claim, and desire to secure by Letters Patent, is—"

and then followed, in his original patent, the claims which appear as claims 1, 2, 3 and 4 of the reissued patent in suit, each of which claims, it will be noted, covered and included the entire combination and co-operation of elements constituting the patentee's complete scale, and of which the indicator drum or cylinder constituted only one single element. The original patent was afterwards reissued, for the purpose of making claim to the indicator drum or cylinder *per se,* and claims 5, 6 and 7 of the reissued patent added.

The patentee had stated in the specification of his original patent that his invention related to automatic computing scales of the character of those disclosed in his patent, and that his invention consisted particularly "in the details of construction and combination of elements, as will be fully hereinafter described, and specifically pointed out in the claims," so that in reissuing the patent with claims for the indicator drum or cylinder *per se* there was an entire departure both from the statement of invention and from the claims contained in

the original patent, which rendered the reissued patent invalid under many decisions of this court, hereinafter referred to, but that defense was overruled, along with all others, by the Court of Appeals in its original decision on the merits of the case.

As expressly stated in the specification of his patent, the patentee was well aware that automatic computing scales of the same general character as his own were old in the art and had been introduced into commercial use. There is no evidence in the record to show what particular scales of this character the patentee referred to in his acknowledgment and disclaimer of the prior art, but among such scales that were substantially identical with his own, except in respect to the specific "details of construction and combination of elements" which he had set forth in his specification as constituting his invention, were those disclosed in the patent to Phinney, No. 106,869, of August 30, 1870 (Record p. 1184), and Babcock, No. 421,805, of February 18, 1890. (Record p. 1240) And the record shows that the Phinney scales were in commercial use in the locality in which the patentee, Smith, resided. The automatic computing scale illustrated and described in each of these prior art patents is absolutely identical in purpose and function and mode of operation and result with that of the reissued patent in suit, and substantially identical with it in details of construction. For the convenience of the court we here insert a reproduction of the drawing of the Babcock patent, the drawing

(No Model.)

C. M BABCOCK.

COMPUTING SPRING SCALES.

No. 421,805. Patented Feb. 18, 1890.

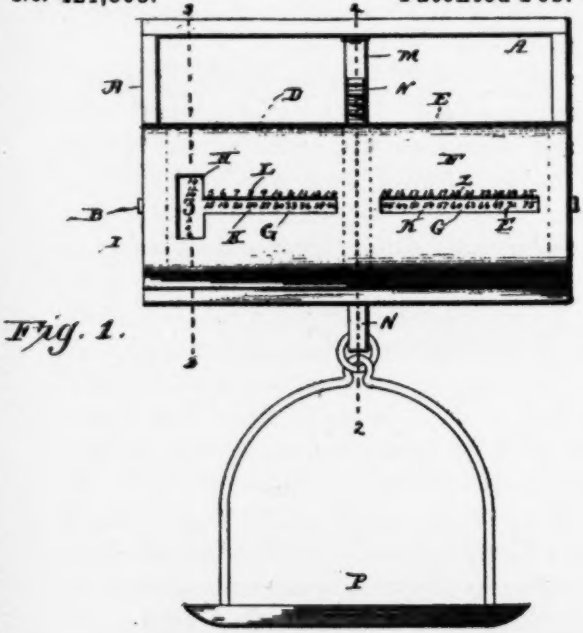


Fig. 1.

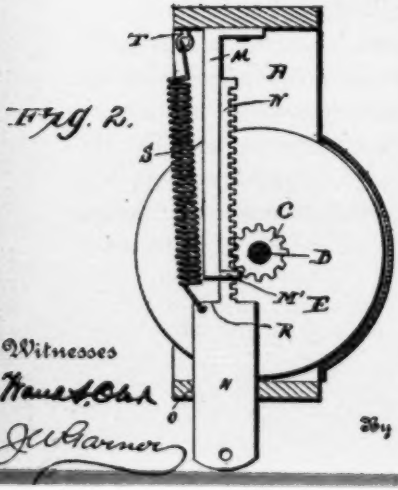


Fig. 2.

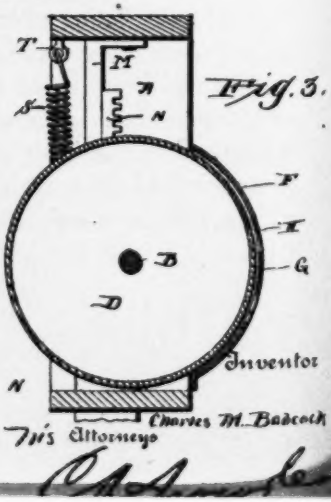


Fig. 3.

Witnesses

Inventor

Charles M. Babcock

By his Attorneys

of the Phinney patent having been reproduced at page 194, *supra*.

Neither Phinney nor Babcock described in his specification the details of construction of his computing drum or cylinder, apparently considering it to be sufficiently disclosed in his drawings, and neither said anything about the material of which it was composed; but common sense, to say nothing of the "skill of the art," would manifestly teach any scale builder to make the computing drum or cylinder as light as practicable, so that its weight would interfere as little as possible with the operation of the scale.

In each instance it was the mere exercise of ordianry common sense and the application of the principles of physics, which have been universally known and applied at least since the date of Sir Isaac Newton's "Principia" published in 1687. In that work he laid down certain elemental laws of motion. One of these was:

> "The acceleration which is produced by a given unbalanced force is inversely proportional to the mass of the particle."

Another was:

> "Action is equal to reaction in a contrary direction."

These rules are applied further by Mills in his "Applied Physics" as follows:

> "The moment of force required to put the mass into rotation about an axis is directly proportional to (1) the weight of mass, (2) to

> the square of the distance of the mass from the axis, (3) and to the angular acceleration. The formula is moment of force = mass x (arm and mass)^2 x angular acceleration. The moment of retardation required to put this mass at rest is arrived at by the inverse of this ratio."

This principle may be stated in modern layman's language as follows:

> "It requires more force and time to put a heavy body into motion about an axis than it does a lighter body, and, conversely, it requires a longer time and more force to put a heavier body to rest when it is in motion than one of lighter weight. In this formula time and force are reciprocal. If one is increased, the other may be decreased."

When we come to compare these well recognized and long published statements of the laws of motion with what the Circuit Court of Appeals held was Smith's patentable discoveries, it becomes too plain for argument, we submit, that Smith's patent is void upon its face. The Circuit Court of Appeals says as follows:

> "It remained for Smith to discover that the most essential thing in reorganizing the old elements was to make the drum so light that its interference with weighing operations would be eliminated. And he embodied that conception or 'happy thought' in the new means described in the patent and covered by the claims of the first patent in suit. * * * Defendant insists, however, that making the drum lighter was merely a matter of degree. Of course, the lessening of weight is a matter of degree, but it is not necessarily merely a matter of degree. If the change converts failure into success, some-

thing more than a matter of degree is involved."

In short, what the Circuit Court of Appeals says is that Smith took notice of what had long been well known and taught (which, as shown by the drawings in their patents, Phinney and Babcock had also noticed), that a cylinder will start more easily and stop more quickly if it is light than if it is heavy; and, as he recognized what any man of common sense must have recognized, that it is desirable in a scale that the indicating cylinder should be quickly set in motion and should come to rest as quickly as may be after the article has been deposited upon the pan or platform, he therefore specified that the indicating cylinder should be made with a skeleton frame work, covered with paper, so that it would be light. This is all there is to what the Circuit Court of Appeals treats as a discovery and a 'happy thought'. There is nothing in it which was not known or used, both in analogous applications and also in the identical use claimed for it by Smith.

We respectfully submit that there was no more novelty in Smith's claim of discovery that lightness is a virtue in a cylinder which it is desired to put in motion easily and stop easily than there was in the alleged discovery of the patentee in *Brown vs. Piper*, 91 U. S. 37 that fish and other articles could be preserved in a closed chamber 'by means of a freezing mixture, having no contact with the atmosphere of the preserving chamber". The principle of that case we submit, applies exactly to the case at bar. Also in point is the decision of this court in *Berlin Mills vs. Proctor* &

Gamble, decided December 6, 1920, 41 Supreme Court Reporter 75. We quote the following from the syllabus of that case as follows:

> "A product which is the result of a mechanican improvement only is not patentable, where the step in advance of that previously disclosed and open to public use is only that which one skilled in the art might well make without the exercise of the originating or inventing faculty."

To make an indicating drum or cylinder for a computing scale as light as practicable and thereby enable it to be set in motion by a small weight deposited on the pan or platform, and to come to rest as quickly as possible after the weight has been deposited, is but the exercise of common sense and the application of elemental principles of physics as hereinbefore shown, and was utterly destitute of anything in the nature of patentable invention. It was the practical application of these same principles of physics which evolved the modern light wheels of our vehicles from the heavy ox-cart wheels. Sulkies used in horse races are of the very lightest design possible in order that the time element of the formula above given may be reduced to a minimum. An application of the rule almost perfectly analogous to the principle of the scale cylinder is the revolving door. It is well recognized by even the most unscientific persons that if the revolving door is not made rather light, a small person cannot quickly and easily put it in motion, and when once enough force has been applied to put it in motion, a longer time

and a greater exercise of strength will be required to stop it.

If the patentee of the reissued patent in suit made any improvement whatever upon the indicating cylinder of an automatic computing scale, as described in prior patents, it was clearly one of degree merely, and not of kind. Moreover, it may be pointed out that in both Phinney's and Babcock's prior patents the computing drum or cylinder consisted of a thin cylindrical chart surrounding and supported upon a central shaft or spindle, which spindle had secured upon it a pinion engaged by a vertically guided spring-supported rack bar upon the lower end of which the pan or receptacle for the article to be weighed was suspended—all exactly as in the scale of the reissued patent in suit.

So far as concerned the mere *material* of which the computing drum or cylinder was composed, the Phinney and Babcock patents left that to the judgment of the scale builder, and there could manifestly be no patentable invention in employing one material rather than another, unless the change or substitution of material brought about some new function or mode of operation of the part in which the materials were employed.

Under well settled rules of law (*Dashiell* v. *Grosvenor,* 162 U. S. 425), the automatic computing scales of the Phinney and Babcock patents were, *prima facie,* operative and useful devices, and, in the absence of any knowledge or information respecting commercial operations under either of the two patents, defendant relied,

and was justified in relying, in its defense on the merits of this cause, upon the patents themselves as substantial anticipations, or effective limitations, of the two claims of the reissued patent in suit. The Court of Appeals brushed the patents aside, however, with the statement that both the Phinney and Babcock scales were "failures"—that they would not weigh twice alike—and that Smith, the patentee of the reissued patent in suit, was the first man in the art to devise a "usable" automatic computing scale, saying (Record p. 1375):

> "In this record the greatest thing is the fact that Smith put in the hands of the world's vendors of commodities the first usable automatic computing scale. Long before Smith's time, and the length of the interval is a fact of considerable weight, the paper art (Phinney's Patent No. 106,869, of 1870, and Babcock's Patent No. 421,805 in 1890) had professed to teach practical scale-makers how to build automatic computing scales. But when those disclosures were given material bodies, failure was the result. Just as Smith said in his specification, they would not work twice alike, they were not reliable."

There was no evidence in the record to support or justify any such finding or statement respecting the Phinney and Babcock scales, and we now know, from the uncontradicted evidence in the accounting record, that the statement was not in fact true respecting the Phinney scales. Defendant had no knowledge of the manufacture and sale and commercial use of the Phinney scales, and while plaintiff had full knowledge of the

facts, as shown in the earlier portion of this brief, it bought up and suppressed the scales and evidence of their use and concealed them from defendant and the court. The record was therefore entirely silent on the subject.

In answer to the objection that in respect to its lightness the computing drum or cylinder of the reissued patent differed, at most, merely in degree from the computing drums and cylinders of prior automatic computing scales, and the objection that the reissued patent was indefinite in respect to the degree of lightness which would be within the contemplated scope of the patent, the court said (Record p. 1376):

> "A further insistence is made that the patent is void for indefiniteness, in this, that the degree of thinness of the aluminum frame and of the paper cylinder are not specified. In the quoted part of the specification Smith substantially told those skilled in the art to make the skeleton frame to the last degree of thinness that would support the cylinder, and to make the cylinder of the very thinnest paper they could then or thereafter find in the market, which would be stiff enough to retain its shape when attached to the frame. This, it seems to us, was very clear and definite instruction."

As in the case of the alleged inoperativeness and failure of the Phinney and Babcock scales, there was no foundation in either the patent or the record for such a finding as this respecting the essential character of the alleged invention of the patent in suit. With respect to the paper cylinder, for instance, plaintiff's own wit-

ness Bell, who was thoroughly familiar with Smith's scales at the time they were being manufactured by the patentee, testified that the paper employed for the cylinders was "heavy paper" (Record p. 9021),—"thick, heavy paper" (p. 904),—paper twice as thick as that of an ordinary magazine cover (p. 913)—"very thick paper," possibly "equal to three or four thicknesses" of the magazine cover, approximately cardboard (p. 915). This was the patentee's own interpretation of the disclosures and teachings of his patent respecting the character of the paper that should be employed for his cylinder; while with respect to the weight and material of the skeleton frames for supporting the paper cylinder on the spindle, the Court of Appeals, notwithstanding its definition of this element or feature of the claims in suit, held the claims infringed by defendant's early scales in which the skeleton frames of the cylinders were made of *steel* as well as by its later scales in which they were made of aluminum. (Record p. 3304).

The findings of the Court of Appeals in its original opinion that the patentee of the patent in suit was the first man in the art to produce a "usable" automatic computing scale, was not only unsupported by the record and contrary to the facts as afterwards established, but it was inconsistent with the statements of the patentee himself, in the specification of the reissued patent here in suit. Thus, he did not say, or intimate, in his specification, that prior automatic computing scales with which he was familiar, and upon which his alleged in-

vention constituted an improvement, were inoperative and useless, or even commercially unsuccessful; on the contrary, what he said was, that

> "The object of my invention is to provide scales of this description *which shall be extraordinarily sensitive to weights of small amount*, and to accurately register the same."

Likewise, in his statement of the defects in prior scales of that character at a later point in his specification (p. 1, lines 91-93), he said:

> "heretofore in scales of this character if a given quantity is weighed successively a number of times it will be found that said scales scarcely ever indicate the weight of such quantity *exactly the same*, there always being some *slight* variation in the amount registered."

These statements of the patentee do not indicate that the prior automatic computing scales with which he was familiar and which he expressly referred to in his specification as having been in use prior to his invention, were not practically and commercially "usable," but merely that they were not "extraordinarily sensitive to weights of small amount," and that where the same quantity of material was weighed twice in succession there was often a "slight variation" in the amount registered. Such fact might well be wholly negligible in the practical and commercial use of such scales for the purposes for which they were and are to-day usually employed in meat markets and grocery stores, where it is not essential that such scale shall be "extraordinarily sensitive to weights of small amount"; and the uncon-

tradicted testimony of the record is to the effect that in the early scales manufactured by the patentee of the reissued patent in suit, under and in accordance with such patent, the extraordinary sensitiveness and accuracy which he sought, and which he refers to in the specification of his patent, were not in fact attained, but that, on the contrary, in such early scales there would often be a variation of as much as half an ounce in the successive weighings of the same article or commodity. (p. 721.) It was not until the scale of the reissued patent in suit had been improved by further patented inventions of the same patentee and others that it attained anything like the sensitiveness and accuracy which the patentee sought and referred to in the specification of the reissued patent in suit. One of such subsequent inventions of the same patentee was that covered by the other one of his two patents originally involved in this cause (No. 597,300, Record p. 1177), which was alleged in the bill of complaint in this cause to cover an invention of great utility and value (Record p. 517), and which the record showed to have been embodied in plaintiff's scales. Still another and more important invention of the same patentee, likewise embodied in plaintiff's commercial scales, was that disclosed in and covered by the twenty-eight claims of his patent, No. 674,883, of May 28, 1901. (Record p. 1338.) In the course of the prosecution of his application for this last-mentioned patent (Record p. 1124), the applicant, urging the patentable novelty of his improvements upon the scales of his two prior patents, said, with respect to the very

element of those prior scales, which is covered by the two claims of the reissued patent here in suit:

> "The *formation of the cylinder* was one of the greatest practical difficulties encountered in the practical manufacture of these scales. The difficulties were largely due to variations in temperature and humidity *and only after a long and costly line of experimentation* was it discovered"

that the difficulties could be overcome by the improvements which the applicant was seeking to patent *by his later application.* Manifestly, he had not taught the public how to make a successful and "reliable" scale by the disclosures of his earlier patent sued upon in the present case.

In idealizing the alleged invention of the reissued patent in suit, and attributing to its qualities and results which neither inhered in nor flowed from it, for the purpose of finding some ground upon which to accord patentable novelty to an apparently unpatentable invention the Court of Appeals said in its original opinion (Record p. 1375) that

> "a tremendous commercial success was awaiting a reliable automatic computing scale,"

and that it was sufficient evidence of patentable novelty that no one prior to Smith had produced such a scale. Aside from the fact that Phinney had produced such a scale years before and introduced it into commercial use, and aside from the fact that Smith's scale of the reissued patent in suit was not itself a "reliable" auto-

matic computing scale in the sense attributed to it by the court, but on the contrary, as the uncontradicted evidence in the record shows, often varied as much as half an ounce in the successive weighings of the same article or commodity, and did not become a successful and "reliable" scale until improved by the subsequent inventions of Smith and others heretofore referred to —aside from these facts, the record shows without contradiction that if "a tremendous commercial success was awaiting a reliable automatic computing scale" it continued to wait many years after the production of Smith's scale of the reissued patent in suit, for it shows that during the two years that Smith and his company carried on the manufacture and sale of his scale less than one hundred of them were sold. (Record p. 900) Nor did the immediate successor of Smith and his company, the Boston Computing Scale Company, fare much better in its efforts to reap "a tremendous commercial success" with Smith's scale. It was not until plaintiff, with its long established and widespread business in computing scales, and with its large resources and large selling organization, took up the Smith scale, as subsequently improved, that it ever became a commercial success. Indeed, as hereinbefore shown by the testimony of plaintiff's own witness, Hopkinson, when the platform type of cylinder scale was produced and placed upon the market the Smith type disappeared.

With respect to the statement of the court in its original opinion (Record p. 1376), to the effect that

"It remained for Smith to discover that the

> most essential thing in reorganizing the old elements was to make the drum so light that its interference with the weighing operations would be eliminated."

it fairly appears from the record that the later commercial success of both plaintiff's and defendant's scales was due for the most part to other improved features of scales of their general type, rather than to the light drum or cylinder of the Smith patent. The provision of such light drum or clyinder fell far short of rendering such scales commercially successful and satisfactory, and it was not until the scale had been very greatly improved by the addition of other inventions and refinements, covered by Smith's two later patents heretofore referred to and numerous others, that the scale became a commercial success. One thing in particular which the record shows to be just as important and essential to a sensitive and accurate scale of this general character as the light drum or cylinder itself is the particular character of the frictionless mountings or bearings for the spindle of the drum or cylinder. (Record pp. 721-724, 847-849). Smith provided nothing of the kind in his scale of the reissued patent in suit, whereas plaintiff's and defendant's modern commercial scales employ anti-friction or frictionless bearings for the mounting of the drum or cylinder of the most delicate and accurate character. But the real success of the cylinder type of scale, such as Phinney's and Babcock's and Smith's, has been due mainly to the combining of the cylinder with a platform con-

struction, with which Smith had nothing to do, and which was not done until years after the date of Smith's patent here in suit. This combination possessed advantages desired by the merchants and was free from the defects of the Smith type of hanging scale. (Record p. 2708) The patent upon this combination was taken out and is now owned by the Toledo company—No. 839,736—and the record shows that it was embodied in each of the scales manufactured by the defendant. (Record, pp. 2228, 2377.) Plaintiff's witness Hopkinson, for fifteen years superintendent of plaintiff's factory, explained the defects in the hanging type of scale of the Smith patent, and the advantages of the platform type, and the reason why the latter entirely superseded the former, as follows (Record pp. 2708, 2709):

> "On direct examination I said that we had received various complaints about our hanging type of cylinder scales. The objection was that the pan rocked backward and forward, and the drum in that kind of a scale oscillated, creating an oscillation in the movement of the drum whereby the reading face of the scale moved slightly backward and forward, making the scale rather difficult to read. So long as the drum would keep oscillating the scale would not register at zero—the drum would be moving continuously, and it would be impossible to read until the scale came to a perfect standstill. I call the dial the inside drum. Before platform cylinder scales were placed on the market, all the drum scales that I (have) any recollection of were of the hanging type. I have never seen any others."
>
> "The platform scale is certainly a distinct

improvement over the hanging scale. For instance, comparing the relative proportion of platform scales now manufactured with the hanging drum scales now manufactured, *the hanging drum scales are practically negligible.* In my opinion, the platform is a distinct advantage from a selling standpoint, and the newest type of anything generally sells better than the old type. Independently of the age, however, the merits of the platform scale, enabling a fixed registration when the scale is at zero quickly and quick reading, *are distinct advantages.*"

Immediately following his testimony above quoted, Mr. Hopkinson further testified that the Smith scales manufactured by the patentee employed what were known as "air dash-pots" for the purpose of arresting the vibrations or oscillations of the indicator drum, that these devices were defective and unsatisfactory, and gave so much trouble that they were finally replaced by "liquid dash-pots" in the scales manufactured by plaintiff under the patent in suit. At page 2709 of the record Mr. Hopkinson explains at length the defects in the air dash-pots of the Smith patent, and the difficulties encountered with them, and then states the advantages of the liquid dash-pots as follows:

"The distinct advantages of the liquid dash-pot over the air dash-pot, in a cylinder scale, in my opinion are that the oscillation of the drum can be retarded more readily and more promptly, and the dasher, or piston, can be made with more clearance around the outer edge—less liability to cause friction. The liquid offers a greater resistance. There would

> ordinarily be no friction—only under normal conditions. Also I think a liquid dash-pot is more susceptible of adjustment, because the dashers in the liquid dash-pot have, for years past, been made with two discs with port-holes or perforations in them, and these holes can be opened or closed for adjustment. These three advantages of the liquid dash-pot are all I think of now. Also, the liquid dash-pot, with the exception of having to be refilled, would require less care than an air dash-pot, and it is possible to close the main opening of the liquid dash-pot, material."
> to prevent the entrance of dust or foreign

In view of the foregoing we respectfully submit that the Smith reissued patent in suit is invalid upon its face and in view of the prior patented art, aside from its complete anticipation by the Phinney commercial scales hereinafter discussed. The Court of Appeals sustained the patent upon the ground that Smith, by the patent in suit, gave to the world the first "usable" and "reliable" automatic computing scale, and upon the further ground that Smith's invention, covered by the patent in suit, consisted in making "the skeleton frame (of the cylinder) to the last degree of thinness that would support the cylinder" and "the cylinder of the very thinnest paper they could then or thereafter find in the market which would be stiff enough to retain its shape when attached to the frame." (Record pp. 1375, 1376.)

As we have shown, Smith did not, by his reissued patent in suit, give to the world its first "usable" and

"reliable" automatic computing scale, nor a usable and reliable automatic computing scale of any kind or date. On the contrary, as we have shown, it was not until the scale disclosed in his patent in suit had been modified and supplemented and improved by numerous inventions, of Smith and others, that it became a practical and successful commercial scale. On the showing of the record, if the Smith scale had been left where his patent in suit left it, it would have been a commercial failure as the Court of Appeals assumes all prior art computing scales to have been.

Furthermore, the characterization of Smith's invention as consisting in making the skeleton frame of the cylinder "to the last degree of thinness that would support the cylinder" and "the cylinder of the very thinnest paper" which could then or thereafter be found in the market that "would be stiff enough to retain its shape when attached to the frame," had no foundation whatever in the teachings and disclosures of the Smith patent, nor in the attempted commercial use of Smith's invention at the hands of its original and early owners. As we have shown by testimony of the plaintiff's own witness, Bell, the paper of which the cylinders of the early Smith scales were made was of the heaviest character that could be called "paper" at all, approximating cardboard in thickness and weight and being double the thickness of an ordinary magazine cover. So far as concerns the weight of the skeleton frames of such cylinders, it does not appear by the record just what their character and weight were, but

it is fairly clear that they were not of "the last degree of thinness that would support the cylinder." Moreover, if this characterization of the skeleton frame of the Smith patent in suit were warranted by anything disclosed in the patent—if to save the claims in issue from anticipation by, or lack of patentable novelty over the prior art it is necessary to restrict them to cylinders having skeleton frames of "the last degree of thinness that would support the cylinder," the holding of the Court of Appeals that the claims were infringed by defendant's scales employing cylinders supported on *steel* frames was wholly inconsistent with such understanding of Smith's invention and such a construction of the claims of his patent. Claim 5 calls for skeleton frames of "light material", while claim 6 calls for skeleton frames of "aluminum." The *steel* skeleton frames of defendant's cylinders were neither of "light material" nor of "aluminum", nor were they of "the last degree of thinness" that would support the cylinder. Under the familiar rule that that which infringes it if later would anticipate it if earlier, it would seem clear that the novelty and validity of the Smith patent cannot be supported upon any such definition of Smith's invention and any such construction of his claims as that placed upon them by the Court of Appeals.

THE SMITH REISSUED PATENT IN SUIT IS COMPLETELY ANTICIPATED BY THE PHINNEY COMMERCIAL SCALES

We submit, with confidence, that the Smith patent in suit should be held invalid for lack of patentable novelty and invention over the prior art, both as disclosed and recognized upon the face of the patent itself and as found in the additional prior patented art in the record. Whatever the judgment of the Court may be upon this question, however, it is clear that the alleged invention of the Smith patent was completely anticipated by the Phinney commercial scales.

As heretofore pointed out, the Phinney *patent* does not describe the *material* of which the computing drum or cylinder of the scales was to be made, nor say anything about its weight, manifestly intending, as was entirely reasonable and proper, to leave those matters to the judgment of those skilled in the art who might have occasion to utilize the invention disclosed in the patent. The drawings of the Phinney patent certainly disclose or indicate a "light-weight" computing drum or cylinder, whether it be composed of "skeleton frames" surrounded by a "paper" cylinder or not, for both the supporting ends and the cylindrical portion of the drum or cylinder are shown as being composed of thin sheet material. Common sense, as well as the "skill of the art" would clearly indicate and require that such a computing drum or cylinder for use in an automatic scale should be as light in weight as it could be conveniently made, and it is

therefore not surprising to find that when Phinney came to embody his invention in commercial scales he did exactly what Smith did many years later, to-wit, made his supporting frames for the cylinder in "skeleton" form, of light material, and the cylinder itself of paper. The skeleton frames of Phinney's commercial cylinders were composed of or formed from thin boards or sheets of wood, analogous to ordinary cigar-box material, which, when cut away to form supporting frames of "skeleton" form, were not only of "light material" but were approximately as light as the "aluminum" frames suggested in the Smith patent in suit. The two were not only manifestly full mechanical equivalents as "light material" for the purpose for which they were used, but aluminum had become a commercially available product during the interim between Phinney's patent and the commercial manufacture of his scales and the date of Smith's alleged invention twenty-odd years later. Nothing could be more natural, therefore, and seemingly more destitute of any element of patentable invention, (in view of the employment by Phinney of light skeleton frames of *wood* for supporting his paper cylinders in 1870), than the employment by Smith of light skeleton frames of *aluminum* for supporting *his* paper cylinders twenty years later.

Moreover, the proceedings upon the application for the Smith reissued patent in suit, found in the file wrapper and contents of such application contained in the record (pp. 1002-1017) would seem to estop the owners of the Smith patent from contending that any

patentable novelty in the subject-matter of the claims in issue can be predicated upon the fact that they call for skeleton frames of either "light material" or of "aluminum". The claims were originally rejected (Record p. 1014) upon the Phinney patent, the Examiner saying:

> "Claims 5 and 7 are rejected on Patent No. 106,869, Aug. 30, 1870 to Phinney, Price Scales, it being old and a well known expedient for mechanics to provide skeleton frames instead of solid ones when the quality of lightness is desired and at the same time sufficient strength retained, those claims are not believed to set forth anything patentable over what is shown in the references.
>
> "Claim 6 is rejected on the same patent on the ground that to make discs or frames of aluminum is not believed to involve invention because the quality of lightness is a well known one of aluminum and that metal is now extensively used where lightness and strength is desired."

In response to this rejection of his claims Smith said (p. 1015):

> "The patent to Phinney, cited by the Examiner, makes no mention of the material of which the two cylinders or drums BB are made. It is to be presumed, as more fully set forth during a personal interview today with the Examiner, that the said cylinders or drums are made of tin or other sheet metal.
>
> "The practical utility of devices of this character depends very essentially upon the lightness of the indicator drum, said drum, if made of sheet metal or other comparatively heavy

material, possessing too much inertia to permit accuracy in its movement. In this connection see the paragraph at the bottom of page *a* (2) and the top of page 3.

"Claims 5, 6, and 7 of this application *do not depend for novelty upon the fact that the frames are made of skeleton metal or of aluminum,* although these are desirable features, *but upon the fact that the cylindrical portion of the drum is composed of a sheet of paper.* It is the construction of this drum that forms the subject-matter of claims 5, 6 and 7, *not the mere provision of skeleton metal frames where solid frames had been theretofore used.*"

As a matter of fact, the original record in this case showed, by the Kepler Patent No. 514,475 and the commercial price-computing scales manufactured under and in accordance with it and employing *paper* cylinders, as represented by the sample of such drums or cylinders in evidence as Defendant's Exhibit, Dayton Cylinder Scales, described Record page 578, that there was nothing novel at the date of Smith's invention in the employment of *paper* for the cylindrical portions of such price-computing drums or cylinders. By idealizing the alleged invention of the Smith patent, however, and reading into the patent attributes and characteristics not suggested by the patentee or employed in his commercial scales, such as that the cylinder should be composed "of the very thinnest paper" that could then or thereafter be found in the market which "would be stiff enough to retain its shape when attached to the frame," the Court of Appeals assumed to find patentable novelty in the alleged invention.

And even then it was obliged to base its finding in part upon the unfounded premise that it was an essential of Smith's alleged invention that the "skeleton frame" should be made of "the last degree of thinness that would support the cylinder", in flat contradiction of the assertion of the patentee himself, in the course of the prosecution of his application, that the patentable novelty of his invention did not consist in supporting his paper cylinders upon skeleton frames of light or thin material at all.

But regardless of these inconsistencies and erroneous findings, the Phinney commercial scales, in and of themselves, constituted a complete anticipation of the claims of the Smith patent which are in issue. Computing Company contended in the Court of Appeals, and will doubtless contend in this court, that the evidence respecting the Phinney commercial scales is not legitimately and properly in the record, and that it cannot be considered, but this position and contention cannot be maintained. The witnesses familiar with the Phinney scales were regularly called and examined and *cross-examined* by way of deposition during the course of the accounting proceedings before the Master, and this evidence is found in the record at pages 2549-2674. Now, this

found in the record at pages 2549-2674. Now, this evidence—the depositions and the samples of Phinney scales accompanying them as exhibits—is not only physically in the record, but it is legitimately and properly there, under all of the authorities, for the primary purpose for which it was introduced, i. e., for the purpose of affording a standard of comparison by which to determine what portion of the profits derived by defendant from its manufacture and sale of its infringing scales should be held attributable to its use of the alleged invention of the Smith patent in suit, and for what portion of such profits, therefore, it should be held accountable to the plaintiff. In other words, what profit and advantage did it derive from the use which it was held to have made of Smith's alleged invention, as compared with the profits and advantages it would have derived from the use of the alternative construction embodied in the Phinney scale? That the evidence concerning the Phinney commercial scales is legitimately and properly and regularly in the record for *this* purpose cannot be seriously questioned.

Mowry v. Whitney, 14 Wall. 620.
Littlefield v. Perry, 21 Wall. 205.
The Cawood Patent, 94 U. S. 695.
Manufacturing Co. v. Cowing, 105 U. S. 253, 255.
Mevs. v. Conover, 11 Pat. Off. Gaz. 1111 cited 125 U. S. 144.
McCreary v. Canal Co., 141 U. S. 459.
Keystone Mfg. Co. v. Adams, 151 U. S. 139.
Coupe v. Royer, 155 U. S. 565.

Maier v. Brown, 17 Fed. 736, 737.
Tomkinson v. Willets, 34 Fed. 536.
Mosher v. Joyce, 45 Fed. 205, 206.
Rose v. Hirsh, 91 Fed. 149, 151.
Wales v. Waterbury Mfg. Co., 101 Fed. 126, 130.
Penfield v. Potts & Co., 126 Fed. 475, 486.
Brinton v. Paxton, 134 Fed. 79-81.
Baker v. Crane Co., 138 Fed. 60.
Force v. Sawyer-Boss Mfg. Co., 143 Fed. 894, 898.
American Co. v. St. Louis Co., 192 Fed. 121, 122.
Clark v. Johnson, 199 Fed. 116, 122.
Dunn Mfg. Co. v. Standard Co., 204 Fed. 617, 619.
Seeger Refrigerator Co. v. American Co., 212 Fed. 742, 751.
Herman v. Youngstown Co., 216 Fed. 604, 607.
Southern Co. v. Fay Co., 259 Fed. 243, 246.

In Keystone Mfg. Co. v. Adams, this court, reversing the decree of the lower court and awarding nominal damages to the plaintiff, said:

> "The infringer is liable for actual, not for possible, gains. The profits, therefore, which he must account for are not those which he might reasonably have made, but those which he did make, by the use of the plaintiff's invention; or, in other words, *the fruits of the advantage which he derived from the use of that invention, over what he would have had in using other means then open to the public and adequate to enable him to obtain an equally bene-*

> *ficial result.* If there was no such advantage in his use of the plaintiff's invention, there can be no decree for profits, and the plaintiff's only remedy is by an action at law for damages." (Italics are ours.)

Computing Company contended before the Master and in the Court of Appeals that standards of comparison could be invoked by a defendant only where its infringement consisted in the *use* of a patented machine or article or process, and that the doctrine had no application to cases in which the infringement consisted in the *manufacture* and *sale* of a patented machine or article; but this position is unsound and untenable, as evidenced by the ruling of this court in *Keystone Mfg. Co. v. Adams, supra,* and other cases, and the ruling of the lower courts in each one of their decisions above cited.

The Master was therefore in error in rejecting the evidence of the Phinney commercial scales for the purposes of the accounting, as he did, although, of course, *he* could not have considered it for any other purposes than the accounting. When the case reached the Court of Appeals that court did not reject the evidence and hold it inadmissible for the purposes of the accounting, but disregarded it upon the ground that there was other evidence in the record which furnished a better standard of comparison, saying (Record p. 2201-2)

> "In its own factory defendant furnished a most excellent standard of comparison, in fact the best we have ever known in accounting cases.

> Its fan automatic computing scale was a later production than complainant's. The two types were virtually duplicates except fan and cylinder. They were made by the same machinery, the same labor, from a common stock of materials, and hadled by the same supervising and selling staffs. In paragraph B of this section we have already made the comparison."

The Court of Appeals did, however, refuse to consider the evidence of the Phinney commercial scales upon the question of the *validity* of the Smith reissued patent. Regardless of its attitude in this respect, however, there can be no question but that this court is at full liberty to consider the evidence of the Phinney commercial scales and determine its bearing and effect upon the validity of the Smith reissued patent, as well as upon the accounting proceedings thereunder. This would be true, under familiar authorities, even if the Court of Appeals had rejected the evidence for all purposes.

Blease v. Garlington, 92 U. S. 1.
Messenger v. Anderson, 225 U. S. 436.
Hamilton-Brown Shoe Co. vs. Wolf Brothers, 240 U. S. 251, 257.
In re De Gottardi et al., 114 Fed. 328.
Independent Baking Powder Co. v. Boorman, 137 Fed. 995.
In re Romine, 138 Fed. 837.
Dowagiac Mfg. Co. v. Lochren et al., 143 Fed. 211.
First National Bank v. Abbott, 165 Fed. 852.
Shubert et al v. Woodward et al., 167 Fed. 47.

Vacuum Cleaner Co. v. Platt, 196 Fed. 398.
Young v. Welch Mfg. Co., 201 Fed. 563.
Presidio Mining Co. et al., v. Overton et al., 270 Fed. 388.

The evidence concerning the Phinney commercial scales is not only physically in the record, but it is legitimately and properly there, and this court is at full liberty to consider and give effect to it, and upon so doing we cannot doubt that it will find the two claims (5 and 6) o fthe Smith reissued patent, which are in suit here, to be completely anticipated by the Phinney scales.

In addition to the samples of the Phinney scales themselves which are in evidence as exhibits accompanying the depositions relating to them, there is also in evidence as Toledo Exhibit No. 1 a scale of the general type and character of defendant's commercial scale, in which the price computing drum or cylinder is constructed in all respects, both as to materials, proportions, etc. the same as the drums or cylinders of the Phinney scales, and the uncontradicted showing of the record is to the effect that such scale is in all respects as practical and perfect a computing scale as those of defendant's regular manufacture.

Claims 5 and 6 of the Smith Reissued Patent Are Invalid for the Reason that They Are Claims For a Different Invention from that Described and Claimed as the Patentee's Invention in His Original Patent

Both by the express terms of the statute relating to reissued patents and under familiar decisions of this court, a patent may be lawfully reissued only for the same invention as that described and claimed in the original patent as the invention intended to be secured and covered by that patent.

The Reissue Statute, so far as it need be considered here, reads as follows:

> "Section 4916. Whenever any patent is inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the Commissioner shall, on the surrender of such patent and the payment of the duty required by law cause a new patent for the same invention, and in accordance with the corrected specifications, to be issued to the patentee," etc.

In order to warrant a reissue, therefore, the original patent must be inoperative or invalid either by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new;

the error must have arisen by inadvertence, accident or mistake; and the reissued patent must be "for the same invention" as the original patent.

In the case at bar there was admittedly no defect or insufficiency in the specification of the original patent (as distinguished from its claims) for the specification of the original patent was not amended or changed in any way in the reissued patent; and there is no pretense or claim that the original patent was inoperative or invalid because of the patentee "claiming as his own invention or discovery more than he had a right to claim as new," since, on the contrary, the very contention on behalf of the patentee is that he did not claim in his original patent as much as he had a right to claim as new, and the sole and admitted purpose of the application for the reissued patent was to add claims 5, 6 and 7 of the reissued patent to the four claims of the original patent, which four claims, together with the specification of the original patent, remain wholly unchanged in the reissue.

Again, there is no showing of any "inadvertence, accident or mistake" in the application for or grant of the original patent; and the file-wrapper of that patent (Record pp. 985-1001) shows that there was in fact no inadvertence, accident or mistake. On the contrary, the patentee applied for and obtained exactly the claims which he intended and desired to obtain, and made no effort or attempt of any kind to obtain any others.

The statute requires that the reissued patent must

be "for the same invention" as the original patent, and this language of the statute has been construed and held by this court, over and over again, to mean that the reissued patent must not only be a patent for the invention *described* or *disclosed* in the original patent, but must be a patent for an invention which the original patent shows upon its face *was intended and attempted to be secured in and by the original patent.*

Parker & Whipple Co. v. Yale Clock Co., 123 U. S. 87, 97, 101.
Hoskin v. Fisher, 125 U. S. 217, 223.
Plow Co. v. Kingman, 129 U. S. 294, 299.
Yale Lock Co. v. Berkshire Bank, 135 U. S. 342, 379.
Electric Co. v. Electric Co., 139 U. S. 481, 500, 501.
Freeman v. Asmus, 145 U. S. 226.
Huber v. Nelson Mfg. Co., 148 U. S. 270, 285, 290.
Corbin Lock Co. v. Eagle Lock Co., 150 U. S. 38, 42.

In the case at bar, the only claim of Smith's original patent *which even mentioned* the light-weight cylinder or drum, now sought to be broadly covered *per se* as a new article of manufacture, was claim 2, and that claim covered said drum only *in combination* with numerous other elements of the scale. The four claims of the original patent having been reproduced in the reissued patent, (Record p. 1172) as the first four claims of the latter, the court can readily compare them with the new claims of the reissue by mere reference

to the latter patent, without the necessity of referring to the original patent itself. As will be there seen, the reissued patent contains the four claims of the original patent, and, in addition, new claims 5, 6 and 7, of which claims 5 and 6 are directed to the light-weight indicator-drum or cylinder alone, and purport to cover it broadly *as a single element or article of manufacture,* without regard to any of the other elements or features of the scale. Thus, it is manifest, that if these two claims were valid, anyone who manufactured, sold or used such indicator-drums alone would infringe these claims, even though he neither made, sold or used any other part of the scale; whereas, under claim 2 of the original patent (which is the only claim of the original patent in any way referring to the indicator-drum) such drum is claimed only in combination with other elements of the scale, so that no one would or could infringe the claim by the mere manufacture, sale or use of the indicator-drum alone.

The two new claims of the reissued patent, which alone are alleged to be infringed by the defendant in the present case, are therefore manifestly claims for something not described and claimed in the original patent *as the invention intended to be covered by the latter.* On the contrary, the only invention intended and attempted to be covered in the original patent, so far as the indicator-drum is concerned, was the *combination* of that drum with the other elements of the scale which are recited in claim 2 of the patent.

It is to be further noted that neither of these

two new claims of the reissued patent is restricted in any way to a price-computing scale, but on the contrary they were manifestly intended to cover the light-weight indicator-drum in question, adapted for use in any sort of a scale or as a part of any kind of a weighing mechanism, price-computing or otherwise, the language of each claim being "indicator-drum for weighing mechanism". They are therefore not in any way identified or associated with or restricted to price-computing scales, but are attempts to cover and secure the indicator-drum *per se* as a single element or article of manufacture, and are therefore manifestly very much broader claims than any claim of the original patent which related to or included the indicator-drum.

These two new claims of the reissued patent are not only broader claims than any contained in the original patent, but under the authorities applicable to the facts of the case they are claims for a *different invention* from anything intended or attempted to be secured as the invention of the patentee in and by the original patent. As before stated, the only intention and attempt to secure the indicator-drum as any part of the patentee's invention, in the application for the original patent, as evidenced either by the patent itself or by the file wrapper and contents of the application for it, was the intention and attempt, embodied in claim 2 of the original patent, to claim said indicator-drum *in combination with other elements* of the scale, whereas in the reissued patent it is claimed as *a single ele-*

ment or structure, wholly independent of such combination or any other.

It is of course an elementary proposition of patent law that a claim for a *combination,* and a claim for any one or more of the elements of that combination less than the whole, are claims for *different* inventions; and this rule has been frequently applied to reissued patents obtained for the purpose of omitting elements included in combination claims of the original patent, or for the purpose of claiming elements singly and independently which were claimed in the original patent only in combination with other elements. In all such cases this court has held the claims of the reissued patent to be invalid upon the ground that they were claims for a different invention from that covered by the original patent.

Mathews v. Machine Company, 105 U. S. 54.
Bantz v. Frantz, 105 U. S. 160.
Johnson v. Railroad Company, 105 U. S. 539.
Gage v. Herring, 107 U. S. 640.
Coon v. Wilson, 113 U. S. 268, 277.
Ives v. Sargent, 119 U. S. 652, 653.
Huber v. Nelson Mfg. Co., 148 U. S. 270, 285, 290.
Corbin Lock Co. v. Eagle Lock Co., 150 U. S. 38, 42.

"Letters Patent No. 4887, bearing date April 30, 1872, granted to Washburn Race and S. R. C. Matthews for an improvement in Hydrants, being a reissue of Letters Patent No. 19,206, dated Jan. 26, 1858, are void, inasmuch

as, *by claiming the elements of the invention separately and not as a combination*, which is claimed in the original Letters, they enlarged the scope of the latter, *and they also cover a different invention.*"

Mathews v. Machine Company, supra.

"Reissued Letters Patent No. 4731, granted Feb. 6, 1872, to Gideon Bantz for an improvement in boiler furnaces for burning wet fuel, are void, inasmuch as the specification and claim attached to the original Letters No. 26.616, which bear date June 22, 1858, were confined to a *combination* therein described, whilst the reissued Letters cover *the several elements of that combination* as distinct inventions."

Bantz v. Frantz, Supra. (Syl.)

"Where, within four months before their expiration, Letters Patent, covering a single claim for a combination of several elements, are reissued and extended, with the same description as before, but containing in addition to the original claim one for a combination of some of the elements only, the reissue is invalid as to the new claims."

Gage v. Herring, Supra. (Syl.)

"The new claim in the reissue being invalid, and the defendant not having infringed the entire combination set forth in the repetition of the old claim, the decree below can neither be upheld upon the new claim, nor modified so as to apply to the other claim, but must be reversed and the case remanded with directions to dismiss the bill."

Ibid., 648.

"All that can be said in respect to the drawings is that they show the pitman-spring device as a part of the bolt intended to be covered by the patent, and described as a combination of which that device forms a part. There is nothing whatever in the drawings to show that the patentee claims to be the inventor of that part *separate from the combination*, as a distinct novelty, useful by itself, or in any other combination; neither is it so described in the specification.

* * * * *

We are, therefore, constrained to the conclusion that the addition of the third and fourth claims, with the corresponding alterations in the specification, is such an expansion of the invention as originally described *as to destroy its identity*, and to that extent to avoid the reissued patent."

Ives v. Sargent, supra.

"Again, this first claim of the reissue clearly operates to broaden and expand the original claim, in that it omits or contains no reference to any means whatever for holding the lock in place vertically, such as are described in the original claim. It drops out and eliminates the elements shown in the original claim, such as the bent-in portion of the plate and the slits *n* and strips *m*, by means of which the necessity for fastening screws was to be dispensed with. This claim of the reissue was, for this reason, clearly unwarranted."

Corbin Lock Co. v. Eagle Lock Co., supra.

The Smith reissued patent in suit is, so far as

claims 5 and 6 and their relation to the claims of the original patent are concerned, exactly the same sort of a reissue as was condemned by this court in each of the foregoing cases, and others that might be cited, and we therefore submit that claims 5 and 6 of that patent are invalid as reissue claims, independently of all other defenses to them.

The Court of Appeals Erred in Awarding Defendant's Entire Profits to Plaintiff

DEFENDANT'S SCALES

Defendant's scales were of an entirely different type from those of the patent in suit, and resembled the latter solely in their employment of rotary indicator drums of cylinders such as those employed in the Phinney and Smith patents. They were all scales of what is known as the "platform" type, in which the article or commodity to be weighed is placed upon a platform mounted on the base of the scale (see illustrations of Defendant's scales at pages 3244-3251 of Record), while the scale of the patent in suit of the "hanging" type, in which the article or commodity to be weighed is placed upon a fan suspended from the scale, the latter being suitably supported from above.

Defendant's scales differed from that of the patent in suit not only in the respect above mentioned, but differed radically from it in respect to the type and character of the counterbalancing mechanisms employed in the respective scales, that of the patent in suit con-

sisting of springs, while that of defendant's scales consisted of an automatically acting pendulum.

In addition to these differences between the two scales, defendant's scale embodied a large number of valuable improvements and attachments, covered by patents of its own, which the record shows without contradiction contributed very largely to the practical and commercial value of defendant's scale, and to the profits derived from its manufacture and sale.

In order that defendant's scale and the scale of the patent in suit may be conveniently compared and contrasted in the foregoing respects, there is shown upon the opposite page a reproduction of Sheet 1 of the drawings of defendant's Hapgood patent, which, with the remaining drawings of said patent (Record pp. 2977-2979) exhibits the details of construction of defendant's scale, as well as its general type and character.

Notwithstanding the limited character of the alleged invention,— the fact that it consisted in a slight improvement in a single part or element of an organized machine; notwithstanding the fact that defendant's machine was of a radically different type, and resembled that of the patent in suit merely in respect to the general character of a single old part or element; and notwithstanding the fact that defendant's machine embodied many valuable improvements covered by patents of its own and shown by the record to have largely contributed to the profits derived from its manufacture and sale, the court has decreed that defend-

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C. H. HAPGOOD.

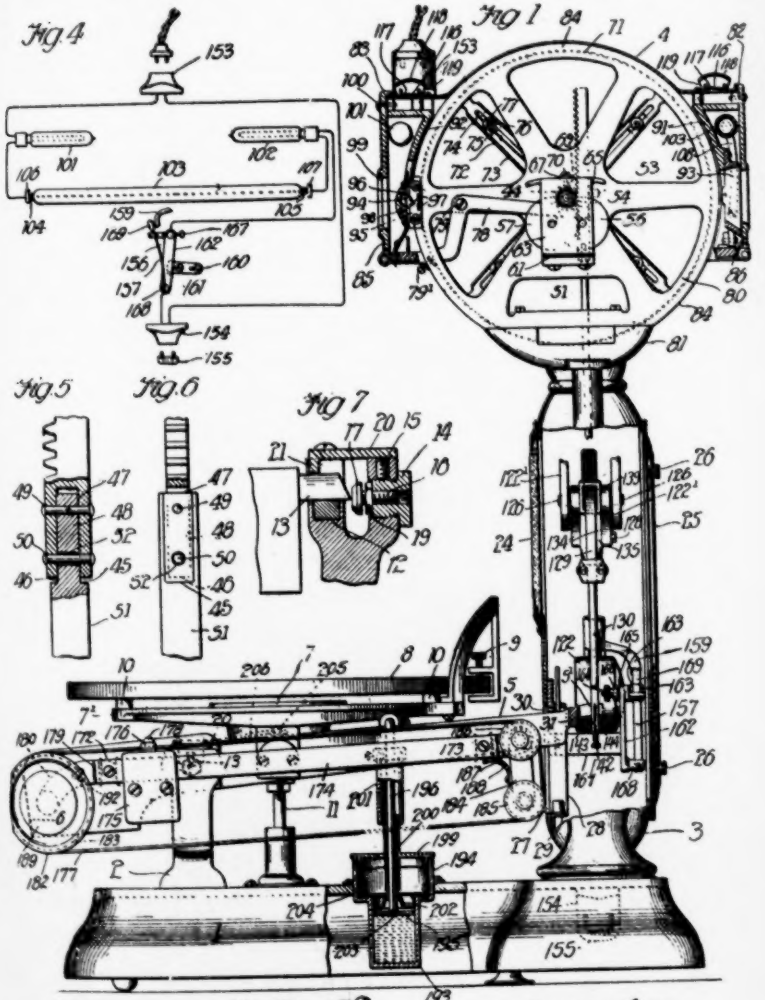
WEIGHING SCALE.

APPLICATION FILED SEPT. 25, 1911.

1,166,128.

Patented Dec. 28, 1915.

3 SHEETS—SHEET 1.



Witnesses:
Martin H. Oleen.
Robert Dobberman

Inventor
Clarence H. Hapgood
By Rector Hibben Davis & Macauley
Atty's

ant shall pay over to plaintiff its entire profits.

The court refused to apportion, or to attempt to make any apportionment of, the profits derived by defendant from its use of plaintiff's patented improvement and from its use of its own patented improvements—not because of any special difficulty in making such apportionment, or because the record contained no evidence upon which such apportionment could be based, the master having expressly refused to find that such apportionment was either difficult or impossible, but solely because the court had said in its original opinion that the patentee of the patent in suit was the first to produce a "usable" automatic computing scale. There was no foundation in the original record for this statement, and it was subsequently shown, by uncontradicted evidence in the accounting record, to be untrue in fact, but even had it been well founded it would not have supported the court's award of defendant's entire profits to plaintiff for the reason, among others, that there were admittedly large numbers of usable and highly successful automatic computing scales on the market and in use (besides those of plaintiff) prior to the beginning of defendant's infringement and throughout the accounting period, and this of itself made them proper standards of comparison for consideration in determining what portion of defendant's profits was due to the patented invention. (*Columbia Wire Co. v. Kokomo Steel & Wire Co.*, 194 Fed. 108, 110; *Brown v. Lanyon Zinc Co.*, 179 Fed. 309, 314, 315; *American Pneumatic Service Co.* v. *Snyder*, 241

Fed. 274; *Minerals Separation Limited v. Butte & Superior Mining Co.*, 274 Fed. 878.)

The court refused to entertain and consider the general or expert evidence offered by defendant respecting the value of the contribution of the several elements and features of defendant's scale—of plaintiff's patented improvement and of defendant's own patented improvements, and of unpatented parts and features— to the entire profits derived from the manufacture and sale of the scale—evidence accepted and found useful by other Courts of Appeal under similar circumstances, and expressly sanctioned and approved by this court in its opinion in the *Dowagiac* case. This evidence shows that the form of indicator employed contributed approximately *two per cent* to the value of the infringing scales.

The court refused to give any consideration whatever to the Phinney scales as a standard of comparison by which to determine the profits derived by defendant from its use of the patented invention, although the uncontradicted evidence of the record showed that the defendant might have employed the indicator-drums or cylinders of the Phinney scales with the same success and satisfaction as the drums and cylinders it did employ—that the one might be readily substituted for the other without affecting in any manner the operation of the scale—and that the employment of the Phinney drums or cylinders would have cost defendant but a few cents more per scale than those which it did employ.

As heretofore pointed out, the mere provision of a light indicator-drum or cylinder fell far short of rendering computing scales of the Smith type commercially successful and satisfactory, and it was not until they had been improved by numerous subsequent inventions, of Smith and others, that they attained anything like the sensitiveness and accuracy which the patentee sought and referred to in the specification of the patent in suit, or became a commercial success. And yet, had defendant's scales in the present case employed every invention and improvement of every one of plaintiff's patents—had they been exact duplicates in every detail of plaintiff's commercial scales embodying those inventions and improvements, instead of being wholly and entirely different from them except in respect to the employment of the old light indicator-drum or cylinder of the Smith and Babcock patents—the Court of Appeals could have done no more than it did, i. e., award defendant's entire profits on its complete scales to the plaintiff.

The record not only shows that plaintiff's commercial scales embodied numerous patented improvements, subsequent to that of the Smith reissued patent in suit, which were essential and vital to the commercial success of such scales, but it likewise shows that defendant's scales employed numerous patented improvements of its own, which were likewise vital and essential to the utility and value of defendant's scales. These various features of defendant's scales were covered by no less than eight patents of defendant, which are found

in the record. And the uncontradicted testimony of the expert witnesses eminently qualified to speak was to the effect that they contributed very largely to the value of defendant's scales. (Record pp. 2196 *et seq;* 2234-2257 *et seq;* 2374 *et seq;* 1138; 1145)

We have heretofore referred to the essential character of the frictionless mountings or bearings for the spindles of the drums or cylinders in defendant's scales, and to the platform type of such scales as distinguished from the hanging type of the Smith scales, and to the substitution of liquid dash-pots for the air-dash-pots of the Smith reissued patent—all of which admittedly contributed largely to the utility and value and success of defendant's scales.

Another patented improvement employed in many of defendant's scales, which contributed very largely to the profits derived from the manufacture and sale of those in which it was embodied, was an automatic illuminating attachment for the indicator, operating to automatically illuminate the figures showing the weight and value whenever an article to be weighed was placed upon the platform of the scale. This automatic illuminating attachment, covered by defendant's Hapgood patent heretofore referred to (Record pp. 2977-80) formed no integral or essential part of the scale—many of defendant's scales embodied it and many of them did not—but was a feature which might be used or not as desired. Nor was it in any way identified with the form of the indicating mechanism of the scale —with the rotary drum or cylinder of plaintiff's pat-

ent in defendant's cylinder scale, or any other particular form of indicator. On the contrary, substantially the same automatic illuminating mechanism was employed in many of defendant's non-infringing fan scales, for the same purpose and with the same result as in its cylinder scales.

The uncontradicted testimony in the record shows that this attachment to defendant's cylinder scales, when employed, cost less than five dollars, and that twenty-five dollars was charged and received for it in the selling price of the scale; and that defendant manufactured and sold 3,000 of such scales. Here was a gross profit of $60,000 on these scales, due wholly to this independent attachment, having nothing whatever to do with plaintiff's invention, and yet the master awarded this profit, with all others, to plaintiff, upon the ground that the automatic illuminating attachment formed a part of the complete scales in which it was embodied, and would have had no market independently of such scales; and the court has approved his finding and ordered these profits paid over to plaintiff.

Still another part or element of defendant's cylinder scales—employed in all of them and constituting a vital and essential element of them, without which they would have been inoperative and useless, and which manifestly contributed materially to their value and to the profits derived from their manufacture and sale,—was the pendulum counterbalancing mechanism, likewise covered by defendant's own patents. A number of defendant's patents related to this mechanism

(Record pp. 2927, 2941, 2951), and one of them, Reissue No. 12,137, had been adjudicated by the District Court and the Court of Appeals for the Seventh Circuit, and held valid and infringed, in a suit of this defendant against Moneyweight Scale Company which was the distributing agency having the exclusive sale of scales manufactured by plaintiff in this case. (178 Fed. 557; 187 Fed. 826.)

As must be clear, therefore, the record conclusively shows that numerous elements and features of defendant's scales, besides the indicator drum—many of them covered by defendant's own patents, and others open to the free use of defendant in common with the rest of the public—*must inevitably have contributed very largely to the utility and value of defendant's scales*, and to the profits derived by defendant from their manufacture and sale. It could not possibly have been otherwise on the showing of the record, and the uncontradicted testimony of Dr. Reichman and the other witnesses hereinafter referred to showed their relative values and their respective contributions to defendant's profits.

If the court had accepted and considered the Phinney scales as a standard of comparison by which to determine defendant's profits, instead of brushing them aside in favor of an alleged standard for which the record formed no basis, it would have had no difficulty in readily determining what profits—how much more profit or how much less profit—defendant derived from its use of the patented drum or cylinder instead of the

Phinney drum or cylinder for the Smith drums and Phinney drums were substantially identical, differing merely in the fact that Phinney used *wooden* spiders or discs upon which to support his paper cylinder, while Smith employed *aluminum* spiders or discs for the same purpose .

There was clear and uncontradicted proof in the record that the spiders or discs of defendant's drums might readily have been made of wood, as were the Phinney drums—that such material would have been entirely satisfactory for the purpose, as evidenced by a sample of defendant's scale (Toledo Exhibit No. 1) equipped with such a drum, and the testimony concerning it (Vol. IV, pp. 2650, *et seq.*)—and that the cost of such drums to defendant would have been approximately thirty-two cents ($.3188) more per drum than the cost of the drums or cylinders which it actually did use. (Compare Vol. IV, pp. 2654-2664, with Vol. V, pp. 2676-2683.)

The Phinney scales and proofs respecting them therefore afforded a thoroughly established, indeed, uncontradicted, basis of comparison with defendant's scales, and the further uncontradicted proofs on behalf of defendant showed that, upon such basis of comparison, defendant made or saved *thirty-two cents per scale* by the use of the Smith drum, as compared with what it would have made or saved if it had used the construction found in the Phinney drum. It was therefore clear error on the part of the master and the court to ignore the evidence respecting the Phinney

scales, and to award plaintiff the entire profits derived by defendant from the manufacture and sale of its cylinder scales.

For years prior to beginning the manufacture of its "cylinder" scales defendant had been extensively manufacturing its non-infringing fan scale, and continued its manufacture and sale throughout the accounting period. This fan type of scale was very much more simple, and much cheaper to manufacture, than defendant's cylinder scale, as evidenced, for instance, by defendant's patents on the two types of scales found at pages 2923, 2926, 2931, 2934, 2940 and 2950, and pages 2959 to 2963 and 2977-2979 of the record. It was of this fan scale that the master said in his report (Vol. V, p. 2766):

> "When the Toledo Company began to manufacture and sell infringing scales, hereinafter called cylinder scales, it was conducting a large, well established business in manufacturing and selling computing pendulum fan scales. The fan scale shows weight and value by means of an indicator index-hand carrying prices per pound moving back and forth across a fan shaped dial, carrying on its face value and weight graduations. At this time defendant had its factory at Toledo and a built-up organization for making and selling fan scales, and after it began to make and sell the infringing scale it continued in the same factory under the same organization to manufacture and sell both fan and cylinder scales."

In awarding plaintiff upwards of $400,000 as the profits alleged to have been derived by defendant from

the manufacture and sale of its cylinder scales, the court not only gave plaintiff defendant's entire profits on those scales, but as a matter of fact awarded plaintiff a sum in excess of the profits derived by defendant *from its entire business,* including the manufacture and sale of both its non-infringing fan scales and its cylinder scales, although the record showed that the manufacture and sale of such fan scales constituted *more than one-half of defendant's business* during the accounting period. (Vol. V, p. 2771.)

Manifestly, this astounding result could have been reached only upon a showing that defendant *lost* nearly as much money on its non-infringing scales as it *made* upon its infringing scales, but the record contains no such showing, and no evidence of any kind upon which any such assumption and finding could be justified. On the contrary, there was an overwhelming presumption that defendant continued to make a profit upon its non-infringing fan scales during the accounting period, just as it had made a profit on them during the preceding five or six years of its business, for the record not only shows, as the master found, that at the time of entering upon the manufacture of its cylinder scales the defendant had a long-established and successful business in the manufacture and sale of its non-infringing fan scales, but it further affirmatively shows that during the last year in which defendant manufactured such fan scales alone, and in which its books of account would therefore distinctly show what profits it made upon them, it made a gross profit of $61, 879.57. (Vol. III, p. 1496.)

Not only did the defendant, as the master expressly found and held, continue to carry on its long established and successful manufacture of its fan scales throughout the period during which it manufactured cylinder scales as well, with the same labor and material and under the same manufacturing conditions, but during the early years of its manufacture of cylinder scales it was necessarily under the extraordinary expense of the invention and design and development of those scales, and preparations for their manufacture, whereas its fan scales were perfected scales for the manufacture of which it was fully equipped.

Moreover, defendant was subject to less competition in the manufacture and sale of its fan scales than in its cylinder scale business, since its patents gave it a substantial monopoly of its fan type of scale. One of these patents, Reissue No. 12,137 (Vol. V, p. 2927) was held valid and infringed by the District Court and the Court of Appeals for the Seventh Circuit in the suit of this defendant against the exclusive sales agent of the plaintiff in this case heretofore referred to. Those adjudications removed the plaintiff in this case from the field as a competitor in defendant's fan scale business, but left it an active competitor in its cylinder scale business.

Under these circumstances it would manifestly require very clear and positive proof to establish the fact that defendant suddenly began to lose money on its fan scales when it engaged in the manufacture of cylinder scales, and the record contains not a word of

proof pointing in that direction, yet the Court of Appeals assumed to answer defendant's argument and to sustain the master's finding upon this point with the ironical remark (Vol. V, p. 3304) that defendant's argument was based upon the fallacy that

> "In a business comprising several branches it is invariably true that each branch makes a profit; or, if it be deemed possible that a non-infringing branch should suffer a loss, then the profit from the infringing branch should first be applied to covering that loss."

Of course, defendant's argument was based upon no such premise, and led to no such conclusion, but was based upon the entire absence from the record of any evidence upon which the master's finding could be supported.

The master's finding was predicated, to the extent of more than a hundred thousand dollars, upon an error in the original statement of account filed by defendant in which its auditor, Mr. Zolg, had inadvertently used, as a basis for determining the cost of defendant's cylinder scales, figures which had been supplied to him by the factory superintendent from a book of "Estimated Costs" which were subsequently shown to be entirely erroneous and far below actual costs. Notwithstanding the fact that defendant promptly applied for leave to correct the error, as soon as it was discovered, the master held it conclusively bound by its original statement, and refused to permit any correction to be made; and the court approved and affirmed the ruling of the master, upon the

theory that such a statement of a defendant in an accounting should be taken as a "verified pleading" and the pleader be held conclusively bound by it. (Vol. V, pp. 3302, 3305.)

These rulings were without precedent to support them, and directly contrary to precedent, as well as in conflict with the spirit and intent of Equity Rule 19. But this is not all, for Mr. Zolg's statement of account,predicated upon the erroneous cost basis referred to, did not cover the entire infringing or accounting period, but merely the last eighteen months of it, from March, 1911, until September, 1912, yet the master, against defendant's protest, insisted upon carrying the error back through the preceding years of the accounting period and applying it to all of the cylinder scales manufactured and sold by the defendant, and the court approved that action. (Vol. V, p. 3305.)

In response to the master's original order for a statement of account, defendant filed a statement covering the period from March 8, 1911, to September 3, 1912, the former being the date at which defendant began the manufacture of scales having aluminum frames for their cylinders and the latter being the date of expiration of the patent in suit. (Vol. V, pp. 2768.) Defendant did not include in its account the cylinder scales manufactured and sold by it prior to March 8, 1911, in all of which the skeleton frames or spiders of the cylinders were formed of steel, because it contended that such scales did not employ the invention of the patent in suit, as that invention had been defined by

the Court of Appeals in its original opinion, and it desired to raise and contest that question before the master. The master ruled that the earlier scales, having the steel spiders, should be included in the accounting, but neither he nor plaintiff's counsel called on defendant for any further statement of account. (Vol. V, pp. 2768, 2794.) On the contrary, instead of calling for a further statement of account, plaintiff sought and obtained from the master an order allowing it to place its own accountants upon defendant's books, to make up its own statement of account, and this was done, such statement being embodied in Plaintiff's Exhibit No. 40 referred to in the master's report and in the opinion of the court.

As will be clear from the foregoing, the only statement of account which defendant ever filed, or was ordered to file, covered the period from March 8, 1911, to September 3, 1912, so that Mr. Zolg's error, even if defendant were to be held conclusively bound by it, did not extend to the portion of the accounting period preceding March 8, 1911, yet, as before stated, the master insisted upon carrying the cost error backward through the entire accounting period, to its very beginning, and applying it to all of the cylinder scales manufactured and sold by defendant, with a resulting error to defendant's prejudice, in this one item alone, of more than a hundred thousand dollars,—the exact amount, as computed by defendant and stated in its brief below, being $125,170.06.

Although plaintiff sought and obtained an order

allowing it to place its own accountants upon defendant's books, and although they examined such books for a period of many months and prepared the elaborate statement embodied in Plaintiff's Exhibit No. 40 before referred to, *they made no effort whatever to ascertain the manufacturing costs of defendant's scales,* as a basis upon which to determine the profits derived by defendant. On the contrary, they based their entire report and finding upon the erroneous cost figures contained in defendant's original statement of account (and applied there to only eighteen months of the entire accounting period) and relied not only upon defendant being held bound by its mistake, but upon having such mistake applied to the entire accounting period. Thus plaintiff's chief accountant, Mr. Hall, who had charge of the examination of defendant's books, testified on this point as follows (Vol. III, p. 1768.)

> "We made no investigation as to the cost of cylinder scales. We took the statement of Mr. Zolg and the testimony in the record that in 1911, five years after this period started, a 345 Scale cost $14.86, as a warrant for saying that in 1906 a type of 300 Scale cost the same amount."

And further, on page 1769:

> "I assumed that this figure given by Mr. Zolg in his account was correct, and though I had to ignore most of the other information submitted by Mr. Zolg in his account, I think it was fair to the company to charge a factory cost of $14.86. I have also stated that under

> all the conditions it would necessarily cost more to make 55 scales per unit cost than it would to make 5,000 scales, but I made no allowance for that in my account."

In other words, plaintiff's accountant, in making up his account, not only assumed that Mr. Zolg's cost figures were correct (or that defendant would be held conclusively bound by them) for the period which they covered, but he applied them to all of the preceding years of the accounting period in total disregard of his testimony that it would necessarily cost more to manufacture defendant's cylinder scales at the very beginning of its operations, when it was engaged in developing and perfecting such scales, and when, as in the first year of their manufacture, it made only fifty-five of them, than it did five years later, when the scale itself and the manufacturing facilities for it had been perfected and the scales were being manufactured at the rate of 5,000 per year.

As must be clear from these considerations, the entire award of the defendant's alleged profits to plaintiff was based upon the wildest conjecture, and upon assumptions having no warrant or foundation in the record, with a resolution of not only every doubtful question against the defendant, but with conclusions to its prejudice which find no support whatever in the record.

The error of more than one hundred thousand dollars in the manufacturing cost of defendant's infringing scales accounts for a substantial portion of the excessive award to plaintiff, and the remainder

of the total sum is largely made up of similar erroneous and unwarranted findings. Thus, the master refused to charge to defendant's cylinder scales any part of the experimental expense incurred by defendant during the six years of the accounting period, charging all of this expense to defendant's non-infringing fan scales, although the record affirmatively showed that a very large portion of this expense was chargeable to the cylinder scales, as would naturally be the fact when it is remembered that they were a new venture for the defendant, involving all of the original experimental and development expense of such a venture, whereas its fan scales were largely perfected and had constituted defendant's regular business for five or six years prior to the beginning of its manufacture of cylinder scales.

Another item of defendant's regular expenses during the accounting period, which the master charged entirely to defendant's noninfringing fan scales, was defendant's patent and litigation expenses during such period, amounting to the sum of $44,696.67, as shown by the master's report. (Vol. III, p. 2778.) Included in these litigation expenses was the cost of defending that part of this very suit against defendant which was based upon the scond Smith patent originally in suit (No. 597,300) *which the Court of Appeals decreed to be invalid.* Here was an item of expense clearly chargeable to defendant's cylinder .scales—an expense incurred in defending such scales against what the court expressly decreed to be an unwarranted attack upon

them—and yet the master charged this expense, with all other litigation expenses, to defendant's noninfringing fan scales.

Another ruling, involving an even greater amount, was that made by the master in respect to "allowances" made by the defendant upon scales traded in by it in exchange and partial payment for new scales. The record shows an error to the prejudice of the defendant, in the matter of these allowances, to the amount of twenty-six thousand dollars in a single year, due to the fact that, on the theory pursued by the master, allowances to that amount were charged to defendant's noninfringing fan scales which should have been charged to defendant's cylinder scales.

It was in ways such as these that the enormous profits alleged to have been derived by defendant from the manufacture and sale of its cylinder scales—profits far in excess of its profits upon its entire business of which such cylinder scales formed less than one-half, were arrived at. Every item of expense in the conduct of defendant's entire business which was not so clearly allocated upon defendant's books of account that the exact portion chargeable to one branch of its business could be separated from the exact portion chargeable to the other branch of its business, or which was not included under the general "overhead" expenses apportionable to the two branches of its business, was charged to defendant's noninfringing fan scales, which, together with the fact that the actual manufacturing cost of defendant's cylinder scales was more than one hundred

thousand dollars in excess of the cost upon which the master's award was based, explains in large measure why the expenses of defendant's business chargeable to its non-infringing fan scales were made so large and the expenses of it chargeable to its cylinder scales were made relatively so small that the astounding finding was made that defendant's profits upon its cylinder scales alone exceeded by some hundreds of thousands of dollars the profits made by it on its entire business, including both fan and cylinder scales. And the Court of Appeals has approved and sustained this award upon the ground that every infringer of a patent must be held to be a trustee *ex maleficio*, and every doubt resolved against him.

DEFENDANT'S INFRINGEMENT NOT WILLFUL OR WANTON

Defendant's infringement was neither willful nor wanton, and there was no warrant for either the vindictive character of the opinion of the Court of Appeals, or for its resolution of all doubts and questions against defendant. Plaintiff's patent had never been adjudicated, although it had been infringed by others (if defendant's scales infringed it) for many years prior to defendant's entrance into the cylinder scale field. It had been infringed by the Federal Scale Company, of Philadelphia, at least as early as the year 1901, when plaintiff began its suit against that company heretofore referred to, for infringement of the two patents sued upon in this cause. It was infringed by The Standard Computing Scale Company,

of Detroit, against whom plaintiff brought another suit on the same two patents sued on in this cause, but never prosecuted to a decree. (Vol. I, p. 295) In addition, plaintiff brought two suits against the present defendant, at Toledo, in the year 1907, alleging infringement of the same two patents sued upon in the present cause, but allowed them to remain unprosecuted for four years, and was then forced by order of court to dismiss them as a condition to being permitted to maintain the present suit which it had in the meantime begun against defendant at Chicago. (Vol. II, pp. 1157-1159, 1384, 1385.)

Plaintiff *knew* that its reissued patent here in suit was invalid, and its competitors *believed* it to be so; and plaintiff's own conduct in bringing suits upon said patent and allowing them to lie for years without prosecution, while advertising them throughout the country and using them to intimidate the trade of its competitors, as it did (Vol. II, pp. 1158, 1384) justified the belief that the patent was invalid and that plaintiff was itself of that opinion.

THE NEGLECT AND REFUSAL OF PLAINTIFF AND THE COURT TO MAKE, OR TO ATTEMPT TO MAKE, ANY APPORTIONMENT OF DEFENDANT'S PROFITS ON ITS CYLINDER SCALES, AND THE ERRONEOUS AWARD OF ITS ENTIRE PROFITS TO PLAINTIFF

Plaintiff made no effort whatever, in its proofs on the accounting, to apportion defendant's profits on its cylinder scales, and show what portion thereof was due to their embodiment of the patented invention, and what

portion to their embodiment of other elements and features, both patented and unpatented; nor did it show, or attempt to show, that the entire value of defendant's scales was due to their embodiment of the patented improvement. On the contrary, plaintiff stood upon the proposition that, the Court of Appeals having said in its original opinion that Smith was the first man to produce a "usable automatic computing scale," plaintiff was entitled to recover from defendant all of the profits derived by it from its manufacture and sale of such a scale, and that there was therefore not only no burden on plaintiff to make or to attempt to make any apportionment of defendant's profits, *but that the master was precluded from doing so.* The master accepted and followed this contention of plaintiff's counsel, and declined to attempt to make any apportionment of profits, and the District Court and Court of Appeals approved his action and confirmed his report.

This was manifest error, for as we read and understand the decision of this court in *Westinghouse* v. *Wagner,* and as it is applied in other circuits, the burden is upon the plaintiff, in the first instance, to at least make an effort to show what portion of defendant's profits is due to its use of the patented invention; and that it is only when such effort fails, and it becomes seemingly impossible to so apportion defendant's profits, that the burden shifts to defendant and imposes upon it the penalty of paying over its entire profits if it is unable, itself, to properly apportion them

or otherwise establish the value of the patented invention. In the present case the plaintiff not only made no effort to apportion defendant's profits, but the master expressly refused to find that such apportionment was impossible. Plaintiff expressly requested the master to make such a finding (Vol. V, p. 2819, ¶xxiv) and the master refused to do so. (p. 2794.)

Notwithstanding the untenable position taken by the plaintiff on the accounting, and the fact that defendant believed then as now that the burden was upon plaintiff in the first instance to make an effort to apportion defendant's profits, defendant assumed the burden of doing so to the extent of calling expert witnesses to testify to the value of the contributions made by the several elements and features of defendant's scales to the entire profits realized therefrom, following in this respect the practice of various Courts of Appeal since the decision of this court in the *Westinghouse* case, and approved by this court in its later decision in *Dowagiac Manufacturing Company* v. *Minnesota Plow Company*, 235 *U. S.* 641. This was done in one way, by the testimony of Doctor Reichmann, for eight years at the head of the Department of Weights and Measures of the State of New York, and otherwise of wide experience in connection with weighing and computing devices (Vol. IV, pp. 2422, *et seq.* and 2439-2446), and his testimony was supplemented by that of a number of other witnesses of wide experience in connection with the manufacture and sale of automatic computing scales. (Vol. IV, pp.

2193, 2234; Vol. IV, pp. 2376 *et seq.*, 2415-2416 2418-2419.) The master refers to this testimony, in his report (Vol. V, pp. 2790-2791), as follows (italics ours):

> "The defendant called three witnesses experienced in the scale art: Halvor O. Hem, Consulting Engineer for the Toledo Scale Company; Charles G. Neale, Commissioner of Weights and Measures for the State of Minnesota; and Dr. Fritz Reichmann, formerly State Superintendent of Weights and Measures for the State of New York, now at the head of the Service Department of the Fairbanks Company of New York. Hem and Neal explained the various parts of an automatic computing scale and pointed out those parts on the scale exhibits mentioned above. Neither testified as to the value, mechanically, commercially or otherwise, of the separate parts. Dr. Reichmann went more into detail, explained the parts of an automatic computing scale, giving the relative importance from a mechanical and also from an economic standpoint of the different parts in per cent figures as follows:
>
> From a mechanical standpoint: (1) Counterforce system 50%; (2) Base and lever system 25%; (3) Connection between counterforce system and indicating mechanism 2%; (4) Dash-pot 5%; (5) Shock Absorber 2%; (6) Mounting for indicating device 5%; (7) Leveling device 5%; (8) *Particular form of indicating device* 2%; (9) Method of arranging figures on indicating device 2%; (10) Arrangement of openings to facilitate readings of such figures by dealer and customer 2%; making up a total of 100%.
>
> From an economic standpoint: (1) Signs

> appearing on scale 5%; (2) Housing of scale 10%; (3) Lever system and combination of a platform and indicating scale, robust appearance and color, 20%; Leveling device 5%; Dash-pot and Shock Absorber 5%; Divisions on particular chart used, 2%; Openings with correct reference marks on customer's and dealer's side for reading figures, 2%; *Particular form of indicating device,* 2%; counterforce system, 49%; making up a total of 100%."

This was exactly the sort of testimony which was accepted and acted on by the Court of Appeals for the Sixth Circuit in *Herman* v. *Youngstown,* 216 Fed. 604, 608, and of which this court said in *Dowagiac Co.* v. *Minnesota Co. supra*:

> "It may well be that mathematical exactness was not possible, but, as is shown in *Westinghouse* v. *Wagner Co., supra* (pp. 617, 620, 621, 622), that degree of accuracy is not required but only reasonable approximation, which usually may be attained through the testimony of experts and persons informed by observation and experience. Testimony of this character is generally helpful and at times indispensable in the solution of such problems. Of course, the result to be accomplished is a rational separation of the net profits so that neither party may have what rightfully belongs to the other, and it is important that the accounting be so conducted as to secure this result if it be reasonably possible."

And it is exactly the sort of testimony that is

now expressly sanctioned by Statute. (Rev. Stat. Sec. 4921 as amended February 18, 1922.)

The master in the present case, however, gave no weight to the testimony in question, although it was wholly uncontradicted, disposing of it in his report (p. 2791), as follows:

> "Dr. Reichmann explained the necessary parts of a complete automatic computing scale without regard to whether it was of the cylinder, cone, dial or disc variety. He dealt with physical parts of a scale and made no distinction between the different kinds of indicating devices or between different devices of the same general kind but of different construction such as light and heavy cylinders. He wholly disregarded the question as to whether any of the parts were covered by patents, combination or otherwise, and did not take the patent in suit into account at all in assigning a value, mechanical or economic, to the indicating device or cylinder to which the patent applies. This may account for his conclusion that the importance of that part of the scale covered by the patent is but two per cent of the whole. The calculations made by Dr. Reichmann as to the relative values of the different parts of a complete machine without considering the value of a patent on one of the essential parts is not helpful in an effort to determine whether all or only a portion of the profits on the sales of the completed scales is due to such patent."

It would seem to be a sufficient answer to the master's conclusion and ruling that the witness was not dealing with patents, but was considering the various

mechanical elements of the scale with respect to their relative importance in the complete machine, and their relative contributions to its utility and value. Upon such consideration, and for such purpose, it was manifestly immaterial whether any one or more of the elements in question was covered by an existing patent or not. As a matter of fact, most of the elements and features referred to were covered by existing patents, of either the plaintiff or the defendant. In defendant's scales the "counterforce system" was the automatically operating weighted pendulum and its connections, heretofore referred to and covered by defendant's own patents. The "base and lever system" was the platform construction employed in defendant's scales, and likewise covered by a patent of its own. The "dash-pot" was the liquid dash-pot heretofore referred to, and also covered by patents of the defendant; while the "openings to facilitate reading of such figures by dealer and customer" was a feature covered by plaintiff's second patent originally involved in the present case, and alleged in the bill of complaint to cover an invention of great utility and value. With equal logic and reason, and equal foundation in fact, it might be asserted that the entire value of the complete scale was dependent *upon any one of a number of the above mentioned patented features,* as to assert that it was based upon the "particular form of indicating device" constituting the improvement of the patent here in suit.

Plaintiff not only made no attempt whatever to

apportion defendant's profits, but it made no effort, and offered no evidence, to show that defendant's profits were in fact all due to the employment of the patented invention in its scales—not a word of evidence showing or tending to show that their value and marketability were in any way dependent upon their embodiment of the alleged invention. Nor did the master make any such finding of fact, or advance it as a basis for his award of defendant's entire profits to plaintiff. Indeed, he expressly found and held that the light drum or cylinder of defendant's scales did not even constitute a "talking point" in the sale of defendant's scales—that it was never mentioned, but that the great talking point advanced in the sale of defendant's scales—its "slogan" as he termed it—was "No Springs—Honest Weight." (Vol. V, pp. 2791.) This talking point or "slogan" of defendant was predicated upon the fact that in plaintiff's scales with which it had to compete the counterbalancing means for the article or commodity being weighed consisted of springs, whereas defendant's scale employed no springs and its counterbalancing mechanism consisted of a weighted pendulum, and the further fact that plaintiff's scales had been found and held to be dishonest in two adjudicated cases—to have been purposely so constructed as to enable the user of them to cheat his customers—the first of such adjudications having been by the Court of Appeals for the Sixth Circuit in *Toledo Computing Scale Company* v. *Computing Scale Company,* 142 Fed. 919, and the second by

the Supreme Court of Massachusetts in *Moneyweight Scale Co.* v. *McBride,* 109 Mass. 503. The plaintiff brought the latter case to this court on writ of error, but dismissed it on March 7, 1912, the day it was called for argument.

In the present case, referring to the decision of this court in *Westinghouse* v. *Wagner,* the Court of Appeals of the Seventh Circuit said, (Vol. V, p. 3301):

> "In our judgment the *Westinghouse case,* 225 U. S. 604, should forever extinguish in the minds of infringers, caught and held by a decree on the merits, the hope, long entertained and theretofore frequently availed of with success, of escaping all but nominal damages by commingling the appropriated property with other property, by hiding, or by drawing herrings across the trail. Equity will pursue an infringer of a patent as vigilantly as it will any other trespasser. And the first fruits of the Westinghouse decision should be this: If a manufacturer, knowing of a patent, decides to chance an unlicensed use, he should realize that he may be caught by a final decree on the merits and be ordered to respond accordingly; and, so realizing, he should be held to the duty of keeping separate and accurate records of all his infringing acts; and, on his failure to keep such records, the court in measuring the damages on account of his trespasses should resolve all doubts against him."

As will be manifest from this statement of the court, it would impose upon the defendant an absolutely impossible burden in order that the defendant might escape a decree for its entire profits, no matter

how small the contribution of the patented invention to them may have been. That is to say, unless the defendant in such a case as the one at bar shall have kept such "separate and accurate records of all his infringing acts" as will enable a mere accountant to determine, from such records, just what portion of his profits were derived from his use of the patented invention and what portion from other sources, he must turn over his entire profits to the plaintiff. Of course, in a case such as the present one, where the complete machine embodied numerous important and valuable inventions and improvements, besides that covered by plaintiff's patent, it would be wholly impossible for the defendant to make or keep any records that would show the exact value of the patented invention and the exact percentage of its contribution to the defendant's profits. It is not a matter of accounting or record keeping at all, but a matter to be determined upon evidence quite aside from any records that could possibly be kept by the manufacturer of the machines. And yet, says the court, unless the defendant accomplishes an impossibility it shall be decreed to pay over to the plaintiff its entire profits, no matter how insignificant may be the contribution made to them by the plaintiff's invention.

This court certainly did not intend to promulgate any such doctrine in its decisions in the *Westinghouse* and *Dowagiac* cases, and no Court of Appeals excepting that of the Seventh Circuit has ever understood it to have done so. On the contrary, they have

all recognized that in a case such as the present one the rule to be applied was that stated by this court in the *Westinghouse* case in the following language:

> "(d) But there are many cases in which the plaintiff's patent is only a part of the machine and creates only a part of the profits. His invention may have been used in combination with valuable improvements made, or other patents appropriated by the infringer, and each may have jointly, but unequally, contributed to the profits. In such case, if plaintiff's patent only created a part of the profits, he is only entitled to recover that part of the net gains. He must, therefore, 'give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show, by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature.' *Garretson* v. *Clark,* 111 U. S. 120."

And likewise its ruling in the *Dowagiac* case, in which it said of the patented invention (page 645):

> "Of course this was an important part, but it was only that; for other parts were required to complete the machine and make it operative. Some of these were simple and easily supplied, such as the tongue and attachments to which the horses were hitched. Others were complex and required careful adjustment. This was especially true of the feeding mechanism,

> whereby the grain was fed from the feed box or reservoir into the several hoppers in continuous, uniform and precisely measured streams, so that it might be deposited in the furrows evenly and in suitable quantity. Only when all the parts were present and so adjusted as to perform their respective functions was the drill a practical and successful machine. In this respect no change resulted from the invention covered by the patent. It effected material improvements in one part, but did not obviate or diminish the necessity for the others.
>
> We think the evidence, although showing that the invention was meritorious, and materially contributed to the value of the infringing drills as marketable machines, made it clear that their value was not entirely attributable to the invention, but was due in a substantial degree to the unpatented parts or features."

A review of the decisions of the various Courts of Appeal in accounting cases, since the decisions of this court in the *Westinghouse* and *Dowagiac* cases, and a comparison of the decisions of the Court of Appeals of the Seventh Circuit with those of the Courts of Appeal of the several other circuits, clearly discloses a wide divergence of views and a radical conflict between the Court of Appeals for the Seventh Circuit and the Courts of Appeal for the other circuits as to the proper interpretation of the law respecting accountings in patent cases. The Court of Appeals for the Seventh Circuit appears to regard the decisions of this court as requiring it, in cases in which the infringement resides in a single element of a complicated machine, to award

to the plaintiff all of the profits made by the defendant on the entire machine in which the infringing feature is embodied, unless defendant's books have been so kept (as is seldom the case and would rarely be possible) that an exact apportionment can be made of the profits due to the use of the patented invention as distinguished from other profits. Other Courts of Appeal, recognizing that such exact apportionment is generally impossible, regard it as the duty of the court to make an approximate apportionment, endeavoring to award to the patentee only that portion of defendant's entire profits that is based upon its use of the patented invention, and if necessary, where exact figures are impossible, accepting general evidence and expert testimony as to the relative value of the patented invention in the organization in which it has been used by the infringer.

We respectfully submit that the latter view is in accord with the rulings of this court in the *Westinghouse* and *Dowagiac* cases, and that the several Courts of Appeal which have adopted and followed that view have correctly interpreted the decisions of this court in those cases, whereas the Court of Appeals for the Seventh Circuit has failed to do so. In illustration of this fact and of this situation, compare (and contrast) the decision of the Court of Appeals for the Seventh Circuit in the present case with the decisions of the Court of Appeals for the Second Circuit in *Underwood Typewriter Co.* v. *Stearns & Co. et al.* 227 Fed. 74, or *Bush & Lane Piano Co.* v. *Becker Bros.* 234 Fed.

79, or its very recent decision in *Metallic Rubber Tire Co.* v. *Hartford Rubber Works,* 275 Fed. 315; or with the decision of the Court of Appeals for the Third Circuit in *Seeger Refrigerator Co.* v. *American Car and Foundry Co.* 219 Fed. 565; or with the decisions of the Court of Appeals for the Sixth Circuit in *Dunn Mfg. Co. et al.* v. *Standard Computing Scale Co.* 204 Fed. 617, or *U. S. Frumentum Co.* v. *Lauhoff et al.* 216 Fed. 610, or *Underwood Typewriter Company* v. *Fox Typewriter Company,* 220 Fed. 880, or *Clark* v. *Schieble Toy & Novelty Co.* 248 Fed. 376; or the decision of the Court of Apeals for the Eighth Circuit in *Coffield Motor Washer Co.* v. *Wayne Manufacturing Co.* 255 Fed. 558.

Or contrast the statement of the Court of Appeals for the Second Circuit in *Underwood Typewriter Co.* v. *E. C. Stearns & Co.* 227 Fed. 74, 79, to the effect that:

> "The doctrine of *Garretson* v. *Clark,* was *reasserted* in *Westinghouse Electric & Manufacturing Co.* v. *Wagner Electric & Manufacturing Co.* 225 U. S. 604, and again in *Dowagiac Manufacturing Co.* v. *Minnesota Moline Plow Co.* 235 U. S. 641."

—with the statement which the Court of Appeals for the Seventh Circuit made at approximately the same date (July 20, 1915-July 28, 1915) in *Western Glass Company* v. *Schmertz Wire Glass Co.* 226 Fed. 730, 735, to the effect that (referring to the decision of this court in *Westinghouse* v. *Wagner*):

> "It comments on *Garretson* v. *Clark,* 111 U. S. 120, and other decisions cited *contra,* and leaves no room for doubt that they were carefully considered and *must be regarded as overruled* in so far as they appear to be inconsistent with the foregoing proposition."

In other words, one Court of Appeals says that *Westinghouse* v. *Wagner* reasserted the doctrine of *Garretson* v. *Clark,* and the other says that it overruled it—and the two courts proceed accordingly in their application of that decision of this court. Manifestly, as between these two Courts of Appeal the amount which a defendant would be called upon to account for upon the same state of facts, in a case involving a possible apportionment of defendant's profits, would depend upon the jurisdiction in which the defendant might be sued.

The same situation presents itself when the attitude and rulings of the Court of Appeals for the Seventh Circuit is compared and contrasted with those of the other several circuits besides the Second. Thus, the Third Circuit has in no instance refused to apportion the defendant's profits where there was any basis for apportionment; nor has the Sixth, or Eighth or Ninth Circuit. On the contrary, the Court of Appeals for the Sixth Circuit, in a number of notable cases, has worked out an equitable apportionment of the defendant's profits, and where such apportionment could not be determined otherwise it has accepted general evidence and the testimony of experts respecting the value of the

contribution to defendant's profits made by the infringing and non-infringing features, respectively—a practice expressly approved by this court in the *Dowagiac* case.

Dunn Mfg. Co. et al. v. *Standard Computing Scale Co.* 204 Fed. 617.
Herman v. *Youngstown,* 216 Fed. 604.
U. S. Frumentum Co. v. *Lauhoff et al.* 216 Fed. 610.
Underwood Typewriter Co. v. *Fox Typewriter Co.* 220 Fed. 880.
Clark v. *Schieble Toy & Novelty Co.* 248 Fed. 376.

Thus, in *Herman v. Youngstown,* 216 Fed. 604, 607, involving an apparatus consisting of a combination of co-operating elements for making blue prints by artificial light, the Court of Appeals for the Sixth Circuit said, in language directly applicable to the instant case:

> "Nor can it properly be said that the entire profits belong to plaintiff merely because his invention was an essential part of the thing sold. The proofs show, as would be apparent enough, that a lamp-controlling device was absolutely necessary, and that, without it, no sales could have been made; but it does not follow that the sales were due to the use of plaintiff's particular form. Other lamp-controlling means were open to defendant, and still others were used by its competitors. There is no evidence showing (the) part played by the patented invention in inducing sales. So far as the evidence indicated anything, it is to the effect that other features distinct from plaintiff's invention were the 'talking points' which sold the machine against its market competition."

So, in the present case, while an indicator of some sort, for showing weight and value, was an essential element of defendant's scales, without which no sales could have been made, "it does not follow that the sales were due to the use of plaintiff's particular form" of indicator. On the contrary, the record affirmatively shows that various other forms of noninfringing indicators might readily have been substituted for the form that was actually employed. (Vol. IV, p. 2435.) So, also, the record in the present case, as in the reported one, showed "that other features distinct from plaintiff's invention were the 'talking points' which sold the machine against its market competition"—the master expressly found in his report that the light drum or cylinder did not constitute a "talking point" in the sale of defendant's scales, and was never mentioned. (Vol. V, p. 2791.)

The ruling of the Court of Appeals for the Sixth Circuit upon the question of apportionment of profits, in the case above mentioned, likewise clearly shows the divergence of its views from those entertained and applied by the Court of Appeals for the Seventh Circuit in the instant and earlier cases. Thus it said, page 607:

> "Can the profits be apportioned? Plaintiff recognizes his initial burden to show the negative of this proposition (*Westinghouse* v. *Wagner*, 225 U. S. 604, 32 Sup Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653), and claims to have discharged the burden by calling, as his witness, Mr. Young, defendant's manager, who testified that there were no bookkeeping data

from which could be made up any accurate statement of the portion of profits attributable to the liquid cylinder; but he further testified that in his opinion the defendant's machine should, for this purpose, be divided into its component parts and the profits apportioned equally to each part. His method of division was to say that the glass cylinder, the curtain, the supporting frame and the lamp with its connections, each constituted, for this purpose, one-fourth of the machine; that 25 per cent of the profits should be apportioned to each; and that this portion attributed to the lamp and connections should be again subdivided into four parts with 6¼ per cent. to each—viz., the lamp, the electrical wires, the automatic cut-out, and the hydraulic cylinder. This being the state of the record, we are confronted with the question how far *Westinghouse* v. *Wagner* is parallel and how far inapplicable to the present situation. We do not find in that case any broad rule that a patentee is entitled to all the profits in every case where his device is a part of a larger structure and where the fraction of profits attributable to the invention cannot be mathematically demonstrated. The converter invented by Westinghouse was of the class of the folding seat in *Yesbera* v. *Hardesty;* it was an integer; the invention, through the rule of combination, extended to every part of the whole structure, which defendant marketed. Even in a case of that class, it does not follow, from anything decided, that the apportionment must be precisely accurate; nor that intelligent expert estimate may not furnish all necessary certainty. In a case of the other class, where the entire composite structure is fairly resolvable into com-

> ponent parts, with some of which the patented invention has no connection, except by way of furnishing the environment in which the invention becomes useful—in a case of that class, the recovery of those profits which did not pertain, except so remotely, to the invention of the patent, must be required by an imperative legal rule before it can satisfy the conscience. In a case of that class, the semi-independent parts may each involve substantially the same cost of material and labor and may each contribute equally to the final marketability. In that event, an equal division of the profits among these parts is both arbitrary and reasonable; arbitrary, because of its form, but reasonable, because obviously fair and just. Into what parts the market device should be, for this purpose, divided, will be for the court, upon inspection of the structure and consideration of the field of invention; whether the parts, so ascertained, do bear this mutual relation or any other mutual relation which permits profit division is a question of expert knowledge; and a man of experience in the manufacturing and selling field can form thereon an intelligent and useful opinion."

As heretofore pointed out, the record in the present case contains exactly the sort of evidence which the court here refers to as acceptable and helpful in determining the relative values of the patented feature and other elements of the machine in which it may be embodied, but such evidence was entirely disregarded by the Court of Appeals in the present case and not even mentioned in its disposition of the case.

That the Court of Appeals for the Sixth Circuit,

like that of the Second Circuit, does not understand this court to have overruled *Garretson* v. *Clark,* in its decisions in the *Westinghouse* and *Dowagiac* cases, is apparent from its reference to those cases in its opinion in the slightly later case of *Underwood Typewriter Co.* v. *Fox Typewriter Co.* 220 Fed. 880, 884, involving a patent on tabulators for typewriting machines, in which it said:

> "It having been developed by plaintiff's own evidence that the profits derived from the infringing machines were not all due to the tabulator, the burden devolved on it to prove what part of the entire profits arose from the use of its invention. *Canda Bros.* v. *Mich. Malleable Iron Co. supra,* page 181. If in fact such proof does not appear in the record, and if plaintiff has failed to show some exempting circumstance preventing the apportionment of profits, the same result must follow here as was attained in such cases as *Westinghouse Co.* v. *Wagner Mfg. Co.* 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222, 41 L. R. A. (N. S.) 653; *Dowagiac Mfg. Co.* v. *Minnesota Moline Plow Co.* 235 U. S. ....., 35 Sup. Ct. 221, 59 L. Ed. ....., decided January 11, 1915; *Garretson* v. *Clark,* 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371; *Seymour* v. *McCormick,* 16 How. 480, 14 L. Ed. 1024; *McCreary* v. *Penn Canal Co.* 141 U. S. 459, 12 Sup. Ct. 40, 35 L. Ed. 817; *Mowry* v. *Whitney,* 81 U. S. (14 Wall.) 620, 20 L. Ed. 860; *Sessions* v. *Romadka,* 45 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609; *Tilghman* v. *Proctor,* 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664; *Keystone Mfg. Co.* v. *Adams,* 151 U. S. 139, 147, 14 Sup. Ct. 295, 38 L.

Ed. 103; *Westinghouse* v. *N. Y. Air Brake Co.* 140 Fed. 545, 72 C. C. A. 61 (C. C. A. 2); and *McSherry Mfg. Co.* v. *Dowagiac Mfg. Co.* 160 Fed. 948, 89 C. C. A. 26 (C. C. A. 6). In the *Garretson* case, at page 121 of 111 U. S. at page 291 of 4 Sup. Ct., 28 L. Ed. 371, it was said:

'When a patent is for an improvement, and not for an entirely new machine or contrivance, the patentee must show in what particulars his improvement has added to the usefulness of the machine or contrivance. He must separate its results distinctly from those of other parts, so that the benefits derived from it may be distinctly seen and appreciated. The rule on this head is aptly stated by Mr. Justice Blatchford in the court below: "The patentee," he says, "must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the pat ented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show, by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article is properly and legally attributable to the patented feature.'

The principle which dominated that case has been recognized by this court in several instances, some of which are *Brennan & Co.* v. *Dowagiac Mfg. Co.* supra (page 477); *Yesbera* v. *Hardesty Mfg. Co. supra* (page 125); *McSherry Mfg. Co.* v. *Dowagiac Mfg. Co. supra; Dunn Mfg. Co.* v. *Standard Computing Scale Co.* 204 Fed. 617, 619, 123 C. C. A. 111; and

Herman v. *Youngstown Car Mfg. Co.* 216 Fed. 604, 132 C. C. A. 608."

The same patent came before the Court of Appeals for the Second Circuit in the slightly later case of *Underwood Typewriter Co.* v. *E. C. Stearns & Co.* 227 Fed. 74, 80, heretofore referred to, in which that court said:

> "It is not seriously claimed that the Stearns machine infringes the Underwood machine as an entirety. There is no single patent covering the whole of either the Stearns or the Underwood typewriting machines. There are some 8 separate patents on the Stearns machine and 43 on the Underwood. But each of these machines has a tabulator attachment, and to that the infringement is confined. The Stearns Company used the tabulator patented by Schneelock, while the Underwood Company used the tabulator or 'column stop' of the Gathright patent. As the infringement does not extend to the entire machine, it does not seem equitable that the infringer should relinquish all the profits made on the sale of his machines, especially when, as in this case, he has not been a willful infringer. The ends of justice are served if he is obliged to turn over to the patentee of the infringed tabulator the portion of the profits due to the use of the infringed device if that can be ascertained. In this case that would not be the profit derived from the tabulator as a whole, but only that portion of the profit attributable to that part of the tabulator which infringed the plaintiff's tabulator device. And the burden rested on the plaintiff to show that a profit was derived from the use of the tabulators as a whole, and

> also to apportion, if possible, the profit derived from the use of the infringing as distinguished from the noninfringing elements of the tabulators. If that had been made impossible by the act of the infringer, then the infringed could properly claim the whole profit, realized from the use of the tabulators. But to establish the principle that one who has acted in good faith and has derived a structure which is in advance over the prior art, but who has in a minor particular technically infringed, must give up not only the profits due to the use of the device, but the entire profits realized from the sale of any machine which makes use of it, although it may be a very insignificant part of the machine, does not accord with one's ideas of justice and of equity."

At an earlier point in its opinion (page 79) the court quoted at length from the decision of this court in *Garretson* v. *Clark,* and said, as we have heretofore pointed out, that

> "The doctrine of *Garretson* v. *Clark* was reasserted in *Westinghouse Electric & Manufacturing Co.* v. *Wagner Electric & Manufacturing Co.* 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222 (1912), and again in *Dowagiac Manufacturing Co.* v. *Minnesota Moline Plow Co.* 235 U. S. 641, 35 Supt. Ct. 221, 59 L. Ed. 398 (1915). In the latter case it was explained that in an apportionment of the profits mathematical exactness is not indispensable, and that reasonable approximation is what is required, which usually may be attained through the testimony of experts and persons informed by observation and experience."

In the very recent case of *Metallic Rubber Tire Co.* v. *Hartford Rubber Works,* 275 Fed. 315, 321, the Court of Appeals for the Second Circuit, reversing a decision of Judge Learned Hand (266 Fed. 543) reaffirmed the views which it had expressed in the earlier decisions above referred to, respecting the apportionment of profits on accountings, saying:

> "If the entire value of the whole infringing tire as a marketable article is properly and legally attributable to the device of the Adams patent, the complainant is entitled to the entire profits on all the tires manufactured and sold by the defendant which embodied the Adams' invention. But, if the whole value of complainant's infringing tire as a marketable article is not solely attributable to the device of the Adams patent, the complainant must separate and apportion by reliable and tangible proof the part of the defendant's profits which are derivable from the use of it in order to establish a claim for more than nominal damages. *Elizabeth* v. *Pavement Co.* 97 U. S. 126, 24 L. Ed. 1000; *Westinghouse Co.* v. *Wagner Co. supra; Hurlburt* v. *Schillinger,* 130 U. S. 456, 472, 9 Sup. Ct. 584, 32 L. Ed. 1011; *Garretson* v. *Clark,* 111 U. S. 120, 4 Sup. Ct. 291, 28 L. Ed. 371; *Wales* v. *Waterbury,* 101 Fed. 126, 41 C. C. A. 250. In *Wales* v. *Waterbury, supra,* which was decided by this court, we said, in speaking of the defendant:
>
> 'The profits for which he is to account are not the total profits, but those only which are attributable to the * * * patented invention. This has always been the rule, and it is a manifestly just one upon principle.'

> And more recently in *Underwood Typewriter Co.* v. *Stearns,* 227 Fed. 74, 78, 141 C. C. A. 622, 626, this court declared that—
>
> 'In determining the profits and damages recoverable for infringement of a patent for a device which constitutes only one feature of the machine or structure sold by defendant, it is the settled rule that the burden of proof rests on the complainant to separate or apportion defendant's profits between the patented and unpatented features and by evidence which is reliable and tangible.'
>
> We certainly are far from finding in this record any evidence whatever that the entire value of the infringing tires was properly and legally attributable to the presence of the wires in the treads. We are quite unable to say that without that device there would have been no market for the tires, and that the defendant's structure would have been non-commercial."

In the reported case the patented invention related to a certain "non-skid" tread for automobile tires, and when the court said that it was unable to find "that without that device there would have been no market for the tires," it referred to the particular form of non-skid tread as the patented "device." The case is on all fours with the instant case in that respect, for while some form of indicator is an essential element of a computing scale, without which it would not be commercial, the record shows that the particular form of indicator is not essential, just as in the reported case the record showed that the particular form of tread was not essential—that automobile tires with other

forms of treads could be and were being sold, just as in the present case the record shows that automatic computing scales with other forms of indicators than that of plaintiff's patent could be and were being sold.

A review of the foregoing cases, and a comparison of them with the decision of the Court of Appeals for the Seventh Circuit in both the instant and earlier cases decided by that court, will show that the Courts of Appeal of the Second and Sixth Circuits are in harmony in their understanding and interpretation of the views of this court as expressed in the *Westinghouse* and *Dowagiac* cases, and at entire variance with those of the Court of Appeals for the Seventh Circuit; and the same is true of the other circuits in which reported decisions of their Courts of Appeal in accounting cases since the *Westinghouse* and *Dowagiac* cases are available. Thus, in respect to the doctrine of trustee *ex maleficio,* so ruthlessly applied by the Court of Appeals for the Seventh Circuit to the defendants in patent cases, the Court of Appeals for the First Circuit very recently (262 Fed. 880) affirmed the decision of the District Court in *Ammon & Person* v. *Narragansett Dairy Company, Ltd.* 254 Fed. 208, 210, in which the latter court said (italics ours):

> "The rule applicable in cases of confusion of goods *extends no further than necessity requires.* See cases cited in Bouvier's Law Dictionary, (Rawles' 3rd Ed.) Vol. I, pp 605, 606."
>
> "In *Westinghouse Co.* v. *Wagner Mfg Co.* 225 U. S. 604, 618, 619, 32 Sup. Ct. 691, 696 (56 L. Ed. 1222), it was said:

'The inseparable profit must be given to the patentee or infringer. The loss had to fall on the innocent or the guilty. In such an alternative the law places the loss on the wrongdoer.'

But only in such alternative is the rule applicable. Whether such alternative exists is a matter of fact, and not of law. It would be altogether too sweeping a proposition to say that, irrespective of particular circumstances, a court should hold that a sale of goods bearing a trade-mark was due to such trade-mark; for it is familiar knowledge that in the sales of many goods bearing trade-marks the trade-mark is a negligible factor, and this would seem especially true of many ordinary articles of consumption. Whether or not things which are mixed can be separated cannot be determined as a matter of law. On the contrary, in many cases it may be quite obvious that marks affixed to goods could have played but an insignificant part in the sale. As was said (225 U. S. on page 620, 32 Sup. Ct. 696—56 L.Ed. 1222—) in the opinion last cited:

'The rule, however, is not intended to penalize the infringer, nor to give the patentee profits to which he is clearly not entitled. So that where, by general evidence, expert testimony, or otherwise, it is shown that his patent is of relatively small value, it will often be possible to prove that, at the utmost, it could not have contributed to more than a given amount of the profits. *Lupton* v. *White,* 15 Vesey, Jr. 432-440. In such cases, except possibly against one who had concealed or destroyed evidence or been guilty of gross wrong, the plaintiff's recovery cannot exceed the amount thus proved, even though it be impossible otherwise more precisely to apportion the profits.'

> The burden is upon the plaintiffs to prove the existence of profits attributable to their trade-mark, and to demonstrate that they are impossible of accurate or approximate apportionment. 225 U. S. 622, 32 Sup. Ct. 691, 56 L. Ed. 1222."

In *Seeger Refrigerator Co.* v. *American Car and Foundry Co.* 219 Fed. 565, a leading case in the Court of Appeals for the Third Circuit, that court, following and discussing the decisions of this court in the *Westinghouse* and *Dowagiac* cases, apportioned defendant's profits on the basis of the relative costs of the patented and other parts of defendant's structure; while the Court of Appeals for the Ninth Circuit, in the later case of *Riverside Heights Orange Growers Association* v. *Stedler,* 240 Fed. 703, 712, apportioning defendant's profits upon a different basis, quoted at length the ruling of this court in *Garretson* v. *Clark,* clearly showing that the Court of Appeals for that circuit, like those of the Second and Sixth Circuits, does not understand that decision to have been overruled by the later decisions of this court in the *Westinghouse* and *Dowagiac* cases.

In view of what has been said respecting the accounting phase of this case, it is clear, we think, that the findings of the court below were erroneous in fact and in law and cannot be allowed to stand. If the court does not hold with us on the patent questions and an award of profits is to be made, the case should therefore be sent back to the Master for further proofs, or the court below should be instructed to make a finding consistent with the law and facts of the case

of what would be a reasonable and just amount. There are several bases afforded by the record upon which a finding on the accounting questions might be directed without dragging the case through another accounting in the courts below. These may be briefly outlined as follows:

> A division of the entire profits of defendant's business between its infringing and non-infringing scales and an award to plaintiff of a portion of defendant's profits upon its infringing type of scales based upon,
>
> (a) The proportionate cost of the patented feature of the scale to the entire scale (following the precedent established by the Court of Appeals for the Third Circuit in the Seeger case, 219 Fed. 565).
>
> (b) The value of the indicating cylinder as compared to the value of the entire scale (following the precedent established by the Court of Appeals for the Sixth Circuit in *Herman* vs. *Youngstown*, 216 Fed. 604).
>
> (c) The standard of comparison afforded by scales of the prior art open and free to defendant's manufacture, and particularly the scales of the Phinney patent, as manufactured and sold and introduced into use by Phinney under and in accordance with that patent.

The amount of defendant's entire profits, as well as the portion of its profits thus assignable to its cylinder type of scale is readily ascertainable from the record. There would be no more justification, however, for awarding plaintiff the entire profits upon the alleged infringing cylinder type of scale when determined in this manner than for awarding it the larger

sum assigned by the Master as profits. In either case, and in any event, the plaintiff would be entitled to recover only that portion of the profits actually derived by defendant from the alleged infringing scales which was due to the claimed invention.

With respect to an award based upon the proportionate cost of the alleged infringing element or feature to the entire scale, following the precedent of the *Seeger* case, the record shows that the cost of the computing cylinder or drum of defendant's scales was approximately one-twentieth of the cost of the entire scale. If the precedent of the *Seeger* case should be followed, therefore, in determining what portion of the entire profits on defendant's alleged infringing scales should be awarded to the plaintiff, it would be approximately one-twentieth of the entire profits upon them.

With respect to the second suggested basis of award, following the precedent established by the Court of Appeals for the Sixth Circuit in *Herman vs. Youngstown Co., supra,* the facts upon which such an award may be predicated are supplied by the testimony of the witnesses Hem (Record 2414-2418), Neale (2418-2422) and Reichmann (2422-2499). Hem is a consulting scale engineer of long and varied experience, Neale is the Commissioner of Weights and Measures for the State of Minnesota, and at the time he testified had been employed by that state for more than twenty-five years in connection with its system of weights and measures, while Doctor Reichmann was, at the time he testified, head of the service department

of the Fairbanks Company of New York, manufacturers of scales and weighing devices, and had formerly been Superintendent of Weights and Measures for the State of New York, preceded by an extended practical experience in connection with the manufacture of scientific instruments, including weighing devices, with W. & L. E. Gurley of Troy, New York, and prior to that time a professor of physics at the University of Chicago. These three men are recognized leaders in their respective spheres in this country. Each of the three analyzed and listed the essential elements of an automatic computing platform scale, and each of them pointed out the embodiment of such elements in defendant's scale (Record 2415-2416, 2418, 2424-2428), while Doctor Reichmann further testified concerning the relation of the several parts to the entire scale and their relative values as parts thereof from both a mechanical and an economic or utility standpoint. Doctor Reichmann's testimony on this point will be found at pages 2441-2448 of the record, where it appears that according to his views the value of the indicating mechanism in defendant's scale is six per cent. of the value of the entire scale, and this indicating mechanism he resolves into its component elements and assigns to the computing drum or cylinder alone the value of two per cent. of the entire scale. As explained at length by him, the foundation and altogether most important part of such a scale is the weighing or counterforce mechanism, without which the scale would be of no value whatever, and

which is merely supplemented by the indicating mechanism, among other supplemental devices or attachments, which are not absolutely essential. Many weighing scales, for instance, have no indicating mechanism, such for example as the ordinary "even balance" scales, and certain types of registering and recording scales. Doctor Reichmann assigned a minimum of fifty per cent. of the entire value of the scale to its weighing or counterforce mechanism. He explains his views and gives the reasons for his conclusions, at the pages of the record above noted, and later was cross-examined at length by plaintiff's counsel at pages 2499-2505, where the court will find, we think, his views and conclusions fully supported.

The relevancy and the propriety of testimony of this character was recognized by the court in *Herman* v. *Youngstown, supra,* and while the court did not there directly follow the testimony which had been introduced, it recognized its pertinency and approved its introduction, but determined for itself the value of the infringing part of the device under consideration in relation to that of the entire device, and decreed accordingly. In the present instance the testimony introduced upon the point under consideration stands wholly uncontradicted, and we think the court will find it helpful in reaching a determination, whether it shall be disposed to accept and follow it in detail or not.

With respect to the fourth of the suggested grounds upon which the court may base an award upon

the record now before it,—an award based upon the standard of comparison afforded by scales of the prior art open and free to defendant's manufacture—the facts and the law upon which such an award may be based on the present record have been discussed at length and need not be repeated here. In addition to the highly successful automatic computing scales which the defendant itself had been extensively manufacturing and selling for many years prior to its alleged infringement of plaintiff's patent, there were the Phinney scales, of the exact type of plaintiff's patented scales in almost every detail, and embodying computing drums or cylinders absolutely identical with those of plaintiff's patent with the sole exception that their skeleton frames or spiders, which supported the paper cylinder, were made of wood instead of metal. Surely wood is a "light" material, as specifically called for by the claims of this patent, and the uncontradicted testimony of the record is to the effect that it would be available and satisfactory for the material of the skeleton frames or spiders of defendant's scale, just as it proved available and satisfactory in the scales manufactured and sold by Phinney and continuously in use for twenty years prior to the date of the infringing period in the present case. There is in evidence a sample of defendant's scale (Toledo Exhibit No. 1) equipped with such a computing drum or cylinder, and the uncontradicted testimony of the record is to the effect that, while somewhat heavier than defendant's computing drums having aluminum frames

or spiders, they are entirely practicable, and that their cost of manufacture, testified to in great detail by competent witnesses, would be approximately thirty-two cents per drum more than those actually used by defendant. Upon the basis of this standard of comparison, therefore, and in the entire absence of any contradictory proofs, the court would be justified (if the Smith Reissue Patent is sustained) in awarding plaintiff that sum per scale as the profits defendant derived by reason of its employment of the infringing drum or cylinder as compared with drums or cylinders of the prior art open and free for its use.

On whatever basis an award is made, it should, of course, only include such of defendant's scales as employed aluminum spiders, since drums with steel spiders do not fall within the terms, either of the claim calling for spiders of "light material" or the claim calling for spiders of "aluminum."

CONCLUSION

It is with regret that we have seen this brief grow to its present size. Our apology, if one be needed, is that we feel so strongly that the result reached in the court below is in every respect a miscarriage of justice and the consequences of an affirmance by this court will be so ruinous to the Toledo Company that we have felt it our duty to incorporate in this brief a discussion of every point which, in our opinion, should appeal to this court.

We earnestly urge upon the court the propriety of its determining once and for all the ultimate and fundamental rights of the parties herein, or if, for any reason this cannot be done, that it accord to Toledo Company an opportunity to submit to the courts of the Sixth Circuit, after full investigation and hearing, Toledo Company's claims that it has been the victim of a most unconscionable fraud and wrongful conspiracy perpetrated and carried out by the Computing Company.

Respectfully submitted,

FREDERICK P. FISH
EDWARD RECTOR
HARRY W. MORGAN
GEORGE D. WELLES,
Solicitors for
Toledo Scale Company.

THOS. H. TRACY
RATHBUN FULLER
HORACE KENT TENNEY
Of Counsel.